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Supreme Court of the United States

October Term A. D. 1936

No. 10

JOSEPH H. BARWISE AND GEORGE THOMPSON, JR., as Trustees of the Estate of Mrs. M. M. (W. I.) Cook, Deceased.

Appellants,

vs.

GEORGE H. SHEPPARD, as Comptroller of the State of Texas, Et Al,

Appellees.

Appeal From the Court of Civil Appeals, Third Supreme Judicial District of Texas

(Reported 89 S. W. (2d) 1026)

APPELLANTS' BRIEF

Grounds of Jurisdiction

This appeal, from the final judgment of the highest court of the State of Texas in which a decision herein could be had, involves the validity of a statute of the State of Texas which appellants challenge, both in terms and as applied, as being repugnant to the Constitution of the United States. The decision of the

state court was in favor of its validity. The law in question (H. B. 154, Acts 1933, 43rd Legislature, page 409, Chapter 162, as amended 1933 First Called Session, page 43, Chapter 12 Vernon's Annotated Texas Statutes, 1925, Supp., Art. 7057-A[1]) levies what is denominated "an occupation tax on oil produced within this state." It provides that the tax "shall be borne ratably by all interested parties including royalty interests."

Appellants are not, in fact, producers of oil or engaged in the business or occupation of producing oil. (R. 7, 26-27, 31, infra pp. 11-13). They own royalty under oil leases owned and operated exclusively by their lessee. The two per cent tax has been collected from them, over their protest, since the law was enacted. (R. 17-19). They sued to enjoin collection of the tax and to recover amounts already collected on the grounds, among others, that the law violates the due process clause of the Fourteenth Amendment, and the obligation of contract clause of the Federal Constitution because: (a) While appellants are not engaged in the business or occupation of producing oil they are arbitrarily said to be so engaged and are taxed accordingly, and (b) part of the royalty payable to them under their leases is appropriated for the benefit of their lessee, in violation of lease contracts. (R.1-10).

These grounds were alleged in appellants' petition (R. 7-10) filed in the trial court, but that court held

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1. See Appendix A, infra pp. 32-51.

"the law assailed is constitutional" (R. 35); they were raised by assignments of error in the Court of Civil Appeals, (R. 36) which affirmed the trial court and upheld the constitutionality of the law, as an occupation tax, on the ground the Legislature had the right to declare appellants were engaged in the business of producing oil, because of their "interest in the success of the business" and, that the obligation of the lease was not impaired, (R. 45-57, and see summary of the opinions infra pp. 14-17). The same errors were assigned in the motion for rehearing in the Court of Civil Appeals (R. 38-40) which was denied (R. 40). The same grounds were urged in a petition for writ of error to the Supreme Court of Texas, (R. 40-42) which was refused (R. 42) and appellants' motion for rehearing, in which the same errors were again assigned, was also denied, (R. 42-44). The decision of the Court of Civil Appeals in this case is reported in 89 S. W. (2) 1026. See similar case, *Group No. 1 Oil Corporation v. Sheppard*, 89 S. W. (2) 1021.

The validity of the law under the Federal Constitution was, therefore, properly drawn in question by objections properly taken, *Zucht v. King*, 260 U. S. 174, *Sultan Ry. v. Department of Labor*, 277 U. S. 135, *Sprout v. South Bend*, 277 U. S. 163, *Lee v. Osceola & L. R. R. Imp. Dist.*, 268 U. S. 643, *Fiske v. Kansas*, 274 U. S. 380.

If we correctly interpret the opinion of the Court of Civil Appeals, this is not a case "where the judgment of the state court rests on two grounds, one involving a federal question and the other not," *Lynch v. New York*, 293 U. S. 52, 55, *Utley v. St. Petersburg*, 292

U. S. 106, 112; or one in which there is a "non-federal ground" "independent of the federal ground and adequate to support it," *Fox Film Corp. v. Muller*, 296 U. S. 207, cf. *Swiss Oil Corp. v. Shanks*, 273 U. S. 407; or one in which there is a "non-federal ground" "so interwoven with the other as not to be an independent matter," *Fox Film Corp. v. Muller*, 296 U. S. 207, *Enterprise Irr. Dist. v. Farmers Mutual Canal Co.*, 243 U. S. 157; *Creswill v. Knights of Pythias*, 225 U. S. 246, infra p. 60, *Abie State Bank v. Bryan*, 282 U. S. 765; or, one in which it is necessary to consider whether a denial on non-federal grounds of claimed constitutional protection "rests upon a fair and substantial basis," *Lawrence v. State Tax Comm.*, 286 U. S., 276, 280-282; *Broad River Power Co. v. South Carolina*, 281 U. S. 537, 540; *Ward v. Love County*, 253 U. S. 17, *Klinger v. Missouri*, 80 U. S. 257; or is "so plainly unfounded that it may be regarded as essentially arbitrary or a mere device to prevent the review of a decision upon the federal question," *McCoy v. Shaw*, 277 U. S. 302; or one in which the constitutional issue was evaded, *Fox River Paper Co. v. Railroad Commission*, 274 U. S. 651; or one in which the federal ground might have been considered by the state court, but was not, *Grayson v. Harris* 267 U. S. 352; or one in which "the Federal right has been denied as the result of a finding of fact it is contended there was no evidence to support," *Creswill v. Knights of Pythias*, supra,—although any other view of the opinion of the court than the one we have, puts it in the class with those cases in which the federal question is so interwoven as not to be an independent matter; in which the decision does not rest upon a fair and substantial basis and is so illusory that it may

be regarded as essentially arbitrary or a device to prevent the review of a decision upon the federal question; in which the constitutional issue was evaded, and those in which the findings upon which the holding rests are contrary to the undisputed evidence and without any support in the record.

There is nothing in this case of an independent nature like the question of severability of the parts of a contract, *Fox Film Corp. v. Muller*, 296 U. S. 207, of waiver, *Eustis v. Bolles*, 150 U. S. 361, *Harding v. Illinois*, 196 U. S. 78, or whether the federal right was prematurely asserted, *Petrie v. Nampa & M. Irr. Dist.*, 248 U. S. 154, or the validity of a contract under state law, *Vandalia R. Co. v. Indiana*, 207 U. S. 359, or of the adequacy of a legal remedy, *McCoy v. Shaw*, 277 U. S. 302, or of the effect of a voluntary payment of taxes, *Gaar, Scott & Co. v. Shannon*, 223 U. S. 468.

On the contrary, this is a case in which appellants cannot be held liable for the tax, as an occupation tax, consistently with the Federal Constitution, on any ground, *Logan Bank v. Townsend*, 139 U. S. 67; it is one in which the judgment could not have been given without deciding the Constitutional questions presented, *Murray v. Charleston*, 96 U. S. 432, *Eustis v. Bolles*, 150 U. S. 361, *Meyer v. Richmond*, 172 U. S. 82, *Gaar Scott & Co. v. Shannon*, 223 U. S. 468, *Harding v. Illinois*, 196 U.S. 78. It is one in which the state court puts its decision denying the federal right claimed upon an erroneous view of the law, *Columbia R. G. & E. Co. v. South Carolina*, 261 U. S. 236, *Grayson v. Harris*, 267 U. S. 352, *Terre Haute & I. R. Co. v. Indiana*, 194 U. S. 579, cf. *Macallen v. Massachusetts*, 279

U. S. 620, *Dorchy v. Kansas*, 272 U. S. 306, and in which the decision of the state questions was preliminary and related to the Federal right only in the sense that it brought the case within the reach of the Federal law relied on, *Grayson v. Harris*, supra.

The jurisdiction does not rest upon surmise, *Lynch v. New York*, supra. The State court clearly held the law could not be sustained as a property tax under the State Constitution, thus leaving for determination the question of its constitutionality as an occupation tax under the identical due process and obligation of contract clauses of the State and Federal Constitution — of which the latter is supreme, *Swiss Oil Corp. v. Shanks*, 273 U. S. 407.

Appellants, not being engaged in the business or occupation of producing oil, and being royalty owners under leases requiring the lessee to pay the expenses of engaging in the business, challenged the law as violating the due process clause of the fourteenth amendment to, and the obligation of contract clause of the Federal Constitution. The Texas courts held the Legislature had power to declare them engaged in the business, *whether they were or not*, and that the fact the law compelled them to bear part of their lessee's expenses did not impair the obligation of the leases. Such holding directly disposes of the Constitutional attack.

The challenged legislation is novel. No similar legislation has ever been sustained by this court. The constitutional questions involved are substantial, *Fiske v. Kansas*, supra, *Sultan Ry. v. Department of Labor*, supra, *Sprout v. South Bend*, supra, *Salinger v. United States*, 272 U. S. 542, *Aetna Life Ins. Co.*

v. Dunken, 266 U. S. 389, and are not lacking in substance within the meaning of *Corrigan v. Buckley*, 271 U. S. 323, *Roberts v. Emmerson*, 271 U. S. 50, *Edward Hines Trustees v. United States*, 263 U. S. 143, and *Zucht v. King*, supra.

The judgment of the Court of Civil Appeals was entered November 13, 1935, (R. 37) motion for rehearing in that court was overruled December 18, 1935, (R. 40) petition for writ of error to the Supreme Court of Texas was denied, February 5, 1936, (R. 42) and motion for rehearing overruled February 26, 1936, (R. 44). Petition for appeal to this court (R. 57) was filed and allowed March 7, 1936, (R. 60) and the record filed in the Clerk's office here March 12, 1936. The petition for appeal was accompanied by the required assignment of errors (R. 58) and the jurisdictional statement (R. 60).

This court has jurisdiction of appeals from the highest court of a state in which a decision can be had, upholding a law where its validity under the Federal Constitution is drawn in question, 28 U. S. C. 344, 861, *Sultan Ry. v. Dept. of Labor*, 277 U. S. 135, *Sprout v. South Bend*, 277 U. S. 163, *Atlantic Coast Line v. Goldsboro*, 232 U. S. 548, *Zucht v. King*, supra, when applied for within three months, 28 U. S. C. 350.

When a Court of Civil Appeals of Texas affirms a judgment "the judgment * * * rendered * * * shall be final" and "the lower court from which the cause was removed need not make any further order or decree therein." *Vernon's Annotated Texas Statutes*, Art. 1857, 1858.

While the Supreme Court of Texas has jurisdiction to review cases from the Courts of Civil Appeals "involving the construction or the validity of statutes" and is required to refuse an application for writ of error "where the judgment of the Court of Civil Appeals is a correct one and where the principle of law declared in the opinion of the court is correctly determined," *Vernon's Annotated Texas Statutes*, Art. 1728, as amended, "the refusal or dismissal of an application" has "the effect of denying the admission of the cause into the Supreme Court" and such "refusal * * * shall not be regarded as a precedent or an authority," *Vernon's Annotated Texas Statutes*, Art. 1750.

It was necessary for appellants to invoke the jurisdiction of the Supreme Court of Texas in order to make it certain that the case could go no further, *Stratton v. Stratton*, 239 U. S. 55, but, when the Supreme Court declined to admit the case, the Court of Civil Appeals became the highest court of the state in which a decision could be had, *American Ry. Express Co. v. Levee*, 263 U. S. 19, *Matthews v. Huwe*, 269 U. S. 262, and in this situation this court has always considered the Texas Courts of Civil Appeals as the highest state court, *Sullivan v. Texas*, 207 U. S. 416, *Bacon v. Texas*, 163 U. S. 207, *St. Louis, S. F. & T. R. R. Co. v. Seale*, 229 U. S. 156, *Zucht v. King*, 260 U. S. 174. This is especially true where on the refusal to admit a case to the high state court the record is returned to the intermediate court (R. 60). *Hodges v. Snyder* 261 U. S. 600, *Rothschild v. Knight*, 184 U. S. 334, *McDonald v. Massachusetts*, 180 U. S. 311.

The appeal was allowed within three months of the entry of the order overruling appellants' motion for rehearing in the Court of Civil Appeals, *Morse v. United States*, 270 U. S. 151, *United States v. Ellicott*, 223 U. S. 524, *Kingman & Co. v. Western Mfg. Co.*, 170 U. S. 675, *Aspen Mining & Smelting Co. v. Billings*, 150 U. S. 31, but it would have been in time if it had been applied for within three months after the Supreme Court of Texas finally acted, *American Ry. Express Co. v. Levee*, supra.

The case is properly here for consideration of the validity of the law both in terms and as applied, *Fiske v. Kansas*, 274 U. S. 380, *Dahnke-Walker Co. v. Bondurant*, 257 U. S. 282.

STATEMENT OF THE CASE

This case involves the constitutionality, under the due process clause of the Fourteenth Amendment and the obligation of contract clause of Article 1, Section 10 of the Federal Constitution, of a law of Texas enacted in 1933, requiring the owners of royalty under oil leases to bear part of the occupation tax levied upon the privilege of engaging in the business of producing oil. The law is challenged as violating the foregoing provisions of the Constitution both in terms (R. 9) and as applied (R. 10).

From 1919 to 1933 "each person owning, controlling, managing, operating or leasing * * * any oil well, or any person who produces in any other manner any oil by taking it from the earth" was required to report the total production quarterly and pay an occupation tax of two per cent of the amount of oil pro-

duced.[1] This law was construed as levying the entire tax upon the lessee producer and none of it upon the royalty owner. (R. 3 and Agreed Facts (R. 31-35).

While this law was in force and on May 11, 1925, Mrs. M. M. Cook, lessor, gave oil leases on part of the Cook Ranch in Shackelford County, Texas, to Roeser & Pendleton, Inc., lessee, by which the lessee "acquired the right, exclusive of everyone, including the lessor, to go upon" and "produce and save oil and gas from said land." The leases provide, as lessor's royalty, for delivery "to the credit of lessor *free of cost*, in the pipe line to which it may connect its wells, the equal one-eighth part of all oil produced," (R. 2, 19-22).

After said leases had been in effect eight years, during all of which time lessee paid the entire 2% gross production tax required under the provisions of the above law, it was amended by H. B. 154, Acts 1933, 43rd Legs. p. 409, ch. 162, and again amended by Acts 1933, 43rd Legs. 1st C. S. p. 43, ch. 12, Vernon's Annotated Texas Statutes 1925, Supp. Art. 7075-A. The amended law in question now levies what is denominated "an occupation tax on oil produced within this State of two cents per barrel." It is provided that the tax "*shall be borne ratably by all interested parties, including royalty interests*" and producers and purchasers are required to withhold from any payments due interested parties, the proportionate tax due, report and pay same to appellee, the Comptroller, who delivers the remittances to the appellee State Treasurer for credit to the proper state fund.

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1. Vernon's Annotated Texas Statutes, Art. 7071, appendix B hereto.

Since this suit was filed, by amendment in 1935 the definition of "producer" was made to include "*any person owning any royalty* or other interest in any oil or its value *whether produced by him, or by some other person on his behalf, either by lease, contract or otherwise.*"[1]

The case was tried (R. 35) upon an agreed Statement of Facts (R. 15), which stipulates that neither Mrs. Cook nor the trustees of her estate

> "ever exercised or attempted to exercise, any degree of control over oil operations on said Cook Ranch; and at no time has either Mrs. Cook or the Trustees of her estate ever produced any oil from the Cook Ranch, or ever been in the occupation of producing oil from the Cook Ranch, but on the contrary Roeser & Pendleton, Inc., and its assigns, have been the sole and exclusive producers of oil and gas from said Cook Ranch, and no other person, save Roeser & Pendleton, Inc. and its assigns, has been engaged in such occupation named. In connection with the foregoing, and in using the phrase, 'Roeser & Pendleton, Inc., and its assigns,' it is meant to include in said term the assigns of Roeser & Pendleton, Inc., but neither Mrs. Cook nor the trustees of her estate, has been such assigns, but they have at all times been merely the owner of substantially one-half of the royalty oil produced from the Cook Ranch by Roeser & Pendleton, Inc., lessee and its assigns, (R. 27. To the same effect see allegations in plaintiffs' petition, R. 7.)
>
> "That neither Mrs. W. I. Cook, during her lifetime, nor the executors or trustees of her estate,

1. The challenged enactment and the amendments are set out in full in Appendix A hereto.

have ever been producers, managers or operators of the oil property upon the Cook Ranch, but at all times since the discovery well was brought in, in 1926, Roeser & Pendleton, Inc., the lessee, and its assigns, have been the exclusive producers, managers and operators of said property.

"That at all times since the discovery well was brought in in February, 1926, Roeser & Pendleton, Inc., lessees, and its assigns, have had the exclusive right to enter upon the Cook Ranch and explore, manage, develop and operate the same for oil and gas, and to produce and save oil therefrom, being accountable to Mrs. Cook and to the executors and trustees of her estate, for her and their part of the royalty oil and gas provided for in the leases hereinbefore mentioned.

"That at no time since the discovery well was brought in on the Cook Ranch in February, 1926, has either Mrs. Cook or her executors or Trustees ever been engaged in the occupation or business of producing oil from the Cook Ranch or elsewhere, but on the contrary, have merely received from the purchaser, the purchase price for their part of the royalty oil produced from said Cook Ranch by Roeser & Pendleton, Inc., lessee, and its assigns." (R. 31).

Appellants' lessee connected its wells to the pipe line of the Humble Oil & Refining Company and the oil was delivered to it on division orders effective in 1932, providing for payment of the regular posted price for the oil, (R. 27-28). The purchaser of the oil was notified by the Comptroller to comply with the law (R. 7) and it in turn advised appellants that, pursuant to the challenged enactment it would deduct from appellants' remittances and pay the State officials the proportionate part of the tax (R. 29-30).

Appellants requested the purchaser to withhold payment of the tax (R. 32-33) and were advised that unless it was permitted to make the payment, arrangements would have to be made to segregate and deliver to appellants their part of the oil (R. 32-34). The Humble Company continued making payments of the tax under protest and the refund sued for herein has since been held in suspense, (R. 18-19).

A former suit to enjoin the enforcement of the taxing act was dismissed by the Federal Court because the requisite jurisdictional amount was not involved, 8 *Fed. Supp.* 21, Id. 293 U. S. 527. This suit in the State Court followed.

In their petition appellants, after pleading the facts, substantially as stated, allege that said law violates the due process clause of the Fourteenth Amendment and the obligation of contract clause of the Federal Constitution because: (a) While appellants are not engaged in the business or occupation of producing oil they are arbitrarily defined to be so engaged and are taxed accordingly, and (b) part of the royalty payable to them under their leases is appropriated for the benefit of their lessee, in violation of the lease contract (R. 1-10). While not involved in this appeal they also alleged the tax is in reality a property tax and as such is violative of provisions of the Texas Constitution[1] requiring that property taxes be equal and uniform, limit them in amount to thirty-five cents on the One Hundred Dollar valuation, require rendition, assessment and payment of such taxes in the

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1. The Constitutional provisions are Appendix C pp. 53-54.

county where the property is situated and the equalization of values for tax purposes by the several County Commissioners' courts;[1] alleging in that connection that these ad valorem taxes on their royalty interest had been assessed and paid in Shackleford County, (R. 11). They prayed for an accounting and refund of the amount held in suspense,[2] and an injunction against the enforcement of the law, (R. 13-14).

Appellees' answer was a general demurrer and general denial, (R. 15) the cause was heard upon the pleadings and the agreed statement of facts (R. 15-35). The trial court held the law constitutional, sustained the general demurrer to appellants' petition and dismissed the suit (R. 35).

Appellants appealed to the Court of Civil Appeals, where they assigned as error the holding of the trial court that said gross production tax law did not violate the mentioned provisions of the Federal Constitution, (R. 36-37). The Court of Civil Appeals affirmed the judgment of the trial court. At the same time it decided another case involving similar questions, and the two opinions, (R. 45-57) 89 S. W. (2) 1021-1037 may be summarized as follows:

> "We construe the act to levy this tax against the various interest holders in the oil produced, including the producer and royalty owners * * * in proportion to their respective interests" and that as thus construed the act is valid and constitutional. "We also hold that for the purpose

1. See Sheffield v. Hogg, infra p. 54.

2. The law authorizing suit for the refund is Appendix D hereto, p. 55.

of levying a gross production or occupation tax on oil, *the Legislature may validly declare the owners of royalty interests in the oil produced to be engaged in the occupation or business of producing oil.*"

The tax is "levied ratably or in proportion to the interest each party has in the oil produced." The law "does not mean that the tax is levied only against the producer." The law does "not levy the tax against the purchaser. He is merely made the agent of the State to collect from the producer or other interest holders the total amount of the tax due; and he is authorized to charge their respective accounts with the proportionate tax due." "Whatever the character of the lease * * * there is always reserved a royalty interest * * * and manifestly this is the 'royalty interest' within the contemplation of the taxing act in suit, and against the owner of which the tax was levied."

"The tax is not dependent upon the character of title under which the producer produces the oil. Nor is the tax levied on the oil in place. *The tax is levied on the business or occupation of producing the oil.*" The act provides that the "royalty interest would be taxed against the owner or holder of the royalty interest."

"We are also clear in the view that for the purpose of levying the gross production tax on the occupation or business of producing oil, *the Legislature may validly declare the owners of royalty or other interests in the oil produced to be engaged in the occupation or business of producing oil.* The ordinary form of oil lease has a dual character or purpose: (1) The conveyance of an estate in the land for development purposes; and (2) the future development and operation of the lease for oil in accordance with the terms, ex-

press and implied, of the contract for the mutual benefit of the parties, their respective benefit being measured by the extent of their interests in the oil produced, or its value. The law is settled that the primary objective or purpose of the oil lease is the production of oil for the mutual profit of the parties. The consideration moving to the lessor is an interest in the oil or its value in money. Thus he has a direct interest in the success of the business. As the holder of the royalty interest the lessor or royalty owner is not only entitled to share in the gross production of the oil, but may under the terms of the lease, expressed or implied, require proper, prudent, and diligent management and development of the business, and has reserved and is entitled to both legal and equitable remedies necessary to enforce the obligations of the lease, and under some circumstances may forfeit the lease for non-development.

"The tax of two cents per barrel on oil produced is a gross production or gross receipts tax, the amount of the tax being measured by the gross activity of the business, *and is under the authorities an occupation tax.* Since the taxing act in suit contempated a tax on gross production of oil, the amount of the levy being measured or determined by the gross receipts of the oil or business, we conclude that the Legislature may reasonably impose the tax burden on those entitled to share in the gross receipts or profits of the oil enterprise, particularly so since under the lease contracts royalty owners may enforce its express and implied covenants, looking to the proper and diligent development and management of the business, to the end that their share in the receipts will increase and produce a greater royalty interest in the business."

"Appellants contend that the taxing act in suit

is violative of the obligation of contract clauses of both the State and Federal Constitutions. This taxing act does not change in any manner the lease contracts between the parties. *The tax is not against the oil royalty. It is levied as a gross production tax on the business or occupation of producing oil.* The tax belongs to the State, and the mere fact that the producer is primarily liable for the payment of the tax, or the fact that the purchaser is required to collect the tax for the State at its source or origin, does not give them any interest in the tax against the royalty interests. They may have benefited by the change of legislative policy of imposing the tax ratably against the respective interest holders in the oil produced; but such legislative tax policy did not impair any obligation of the lease contracts.

"In this connection appellants cite several cases in support of the contention that royalty owners under the ordinary form of oil and gas leases are not engaged in the business of producing oil. * * * *The Legislature may validly declare the owners of royalty interests in the oil produced to be engaged in the business or occupation of producing oil for the purpose of levying the occupation tax against them.*"

The assigned errors (R. 58-59) are as follows:

1. The Court of Civil Appeals erred in holding the Legislature and appellees could, consistently with the due process clause of the Federal Constitution, arbitrarily provide and say in and under the law in question that appellants are engaged in the business of producing oil, when they are not in fact so engaged, in order to lay upon them a tax for which they could not be held liable, unless they were so engaged.

2. Appellants antecedent leases having obligated the lessee to deliver appellants' royalty oil to their credit in the pipe line free of cost, the Court of Civil Appeals erred in holding that the obligation of said leases was not impaired in violation of the obligation of contract and due process clauses of the Federal Constitution, by the tax law in question, which authorizes and requires the deduction of two per cent of the proceeds of lessor's oil, which relieves the lessee of a part of the cost of producing the oil, makes the appellants' royalty interest less valuable, and the method of enforcing the lease entirely different than when it was made.

3. The Court of Civil Appeals erred in holding the law in question does not contravene the provisions of the Federal Constitution mentioned in plaintiffs' petition.

4. The Court of Civil Appeals erred in holding appellants were not entitled to recover the taxes exacted, and to enjoin the future taxes assessed under the laws in question.

We submit the following (R. 61):

POINTS

I

It being an admitted fact that appellants are not engaged in the business of producing oil, the Texas Gross Production Tax law of 1933, as amended, which arbitrarily provides that they are engaged in such business, to lay an otherwise prohibited tax upon them, contravenes the due process clause of the Fourteenth Amendment to the Federal Constitution.

II

Appellants antecedent leases having obligated the lessee to deliver appellants' royalty oil to their credit in the pipe line free of cost, the tax law in question which authorizes and requires the deduction of two per cent of the proceeds of appellants' oil and the addition of a like amount to the proceeds of their lessees' oil, which relieves the lessee of a part of the cost of producing the oil, makes the appellants' royalty interest less valuable, and the method of enforcing the lease entirely different than when it was made, violates the due process clause of the Fourteenth Amendment to, and the obligation of contract clause of the Federal Constitution.

ARGUMENT[1]

The State Court, basing its holding on rules which could apply only if the law levied a property tax, held the law levied the tax upon the occupation or business of producing oil. It treated the tax as if it were levied on the active engaging in the business or occupation of producing oil, and said it was properly made payable by those owning the oil, in proportion to their respective interests therein, irrespective of their activity in the business or occupation. It did not find that appellants, who are royalty owners and admittedly are not engaged in the business or occupation of producing oil, were in fact engaged therein, but undertook to justify their treatment as producers, by saying their right to receive royalty, to enforce the express and implied covenants of the lease, and the

1. Most of the authorities cited in this argument are alphabetically arranged, analyzed and quoted from in Appendix E hereto.

mutual benefit which results to all parties from fulfillment of the lease contract, gave them a "direct interest in the success of the business."

Its holding means that while the tax is an occupation tax on the business of producing oil, it loses none of its characteristics when it is spread on all who have an interest in the oil, solely because of such interest therein and irrespective of their lack of activity in the business. If one of the parties interested in the oil has to pay a tax for producing it, everyone else interested in it has to pay a part of the tax, regardless of whether or not he engages in the business taxed.

While the construction of state statutes and constitutions, and the rights of parties under contracts, are questions of local law on which the decision of the state court is ordinarily final, *Fox River Paper Co. v. Railroad Commission*, 274 U. S. 651, *Swiss Oil Corporation v. Shanks*, 273 U. S. 407, *Sauer v. New York*, 206 U. S. 536, *Vandalia R. Co. v. Indiana*, 207 U. S. 359, cf. *Dorchy v. Kansas*, 272 U. S. 306, the effect of a law on rights secured by the Federal Constitution cannot be foreclosed by a decision of the state courts, *Educational Film Corporation v. Ward*, 282 U. S. 379. This Court determines for itself the nature and effect of a tax, regardless of the definition of it by the state court, *Lawrence v. State Tax Commission*, 286 U. S. 276, 282, *Educational Film Corporation v. Ward*, supra, *Macallen v. Massachusetts*, 279 U. S. 620, 625, *G. H. & S. A. Ry. Co. v. Texas*, 210 U. S. 217, *Murray v. Charleston*, 96 U. S. 432. *Appleby v. New York*, 271 U. S. 364, especially where the State court, clearly relying on the uncon-

stitutional legislation, bases its decision on an untenable view of the rights and situation of the parties, *Columbia R. G. & E. Co. v. South Carolina*, 261 U. S. 236, *Terre Haute & I. R. Co. v. Indiana*, 194 U. S. 579, which is entirely without support in the evidence, cf. *Creswill v. Knights of Pythias*, 225 U. S. 246, *B. & W. Taxi Co. v. B. & Y. Taxi Co.*, 276 U. S. 529-30.

FIRST: Appellants' petition alleges they are not engaged in the business or occupation of producing oil. Appellees' demurrer, which was sustained to the petition, admits these allegations to be true. The portions of the agreed statement of facts which we have copied in the statement of the case (supra pp. 11-12). show that appellants have no part in the business or occupation of producing oil from the leased premises.

Under the leases they have no right to participate or engage in the business of producing oil on the leased premises. "By the agreement (the leases) the exclusive right to take and appropriate all the minerals is conveyed and during the term of the lease the lessor has no right to enter and operate for oil," *Barnsdall v. Bradford Gas Company*, 225 Pa. 343, 74 A 207, 26 L. R. A. (N. S.) 614. "The *lessee* had the right to take *full* charge of the land so far as necessary to get the oil from under it." *Japhet v. McRae*, (Com. Apps. Tex.) 276 S. W. 669, 671. An oil lease confers "on the lessee the essentials of ownership: possession with unrestricted power of appropriation * * * of the oil," *Waggoner Estate v. Wichita County*, 273 U. S. 113, which follows *Japhet v. McRae*, supra, and *Barnsdall v. Bradford Gas Co.*, supra. These cases are discussed and followed in *Sheffield v. Hogg* (Tex. Sup.) 77 S. W. (2) 1021, 1026-

1027. cf. *Sauder v. Mid-Continent Petroleum Corpn.*, 292 U. S. 272.

These cases make it plain that a Texas oil and gas lease, first, reserves to the lessor an estate in the land to the extent of the royalty reserved and divests out of lessor all right to engage in the business of producing oil on the premises during the life of the lease; and, second, it vests in the lessee title to all the oil in place, except the reserved royalty, and vests in the lessee the exclusive right to go upon the premises and there engage in the business of producing oil. As shortly stated by the same court from which this appeal was taken, in *Shell Pet. Corp. v. State*, 86 S. W. (2) 245, 249, where an oil lease has been executed the lessor "has parted with every title and interest in land except that of a royalty holder of minerals under a mineral lease which accords to the lessee the full right of development and consequently of possession," and "the interest reserved is" not sufficient to support an action in trespass to try title, in which under the Texas law, plaintiff must show he was in possession or entitled to possession, *Vernon's Annotated Texas Statutes*, Art. 7365, *State v. Dayton Lumber Co.*, 106 Tex. 41, 155 S. W. 1178.

Nevertheless, appellees, purporting to act under the challenged law, have declared appellants are engaged in the business or occupation of producing oil, in order to collect this so-called occupation tax from them, notwithstanding they are not engaged in such business or occupation, in fact, and have no legal right to engage therein, under the leases.

While the Court of Civil Appeals says the tax on appellants is an occupation tax, levied on the business

or occupation of producing oil, it points to no *activity in relation to the business of producing oil*, which a lessor can engage in. Indeed, there is none. It says, however, that appellants own the royalty and have contractual rights under the lease, which justify calling lessors producers. This is where it errs, for these rights are the rights of an *owner*, not evidence that one is engaged actively in business.

The *right* of the lessor *to have the royalty paid*, and *his right to enforce* the express and implied *covenants* of the lease, *are incidents of ownership*. A tax upon them would be a tax upon property. "To levy a tax by reason of ownership is to tax the property * * * it cannot be made an occupation or excise tax by calling it so." *Dawson v. Kentucky Distilleries, etc., Co.*, 255 U. S. 288. "A tax upon property holders in respect of their estate, whether real or personal, or of income yielded by such estate, and the payment of which cannot be avoided, are direct taxes." "It has always been considered that a tax upon real estate eo nomine, *or upon its owners in respect thereof is a direct tax.*" "We are unable to conclude that the enforced subtraction from the yield of all the owner's real or personal property * * * is so different from a tax upon the property itself, that it is not a direct but an indirect tax," *Pollock v. Farmers Loan & Trust Co.*, 157 U. S. 429, Id. 158 U. S. 601.

On the other hand "the requirement to pay" a privilege tax "*involves the exercise of privileges* and the element of absolute and unavoidable demand is lacking." *Flint v. Stone Tracy Co.*, 220 U. S. 107. "The distinction lies between the attempt to tax the property as such, and to measure a legitimate tax upon

the privileges enjoyed in the use of such property." *Western Union Tel. Co. v. Kansas*, 216 U. S. 1. "The difference * * * is not merely nominal but rests upon substantial differences between the ownership of property and the *active doing of business in a certain way.*" *Flint v. Stone Tracy Co.*, supra.

Zonne v. Minneapolis Syndicate, 220 U. S. 187, *McCoach v. Minehill S. & H. Co.*, 228 U. S. 295, *United States v. Emery Bird, Thayer R. Co.*, 237 U. S. 28, all hold that corporations not engaged in business, *but merely receiving rents from their property*, are not liable to pay the excise tax on corporations "engaged in business."

To lay a tax upon the lessor because of the legal and equitable rights and remedies which he has for the enforcement of the express or implied obligations of an oil lease is, under the rule of the cases cited, to tax the property itself. This is the thing the Court of Civil Appeals says cannot constitutionally be, and was not done, but the holding involves a *contradiction*. The ordinary incident of an occupation tax, is the actual doing of business of the kind taxed. This the court ignores, and, in the same breath it says the tax is an occupation tax, it turns to the principles of property taxation and says the tax is justified because of nothing more than the property rights of the lessor under the lease.

> "The words of the act and the opinion of the state court as to the nature of the tax are to be given consideration and weight; but they are not conclusive. As it many times has been decided, neither state courts nor legislatures, by giving the tax a particular name, or by using some form of words, can take away our duty to consider its

nature and effect. Choctaw, O. & G. R. Co. v. Harrison, 235 U. S. 292, Galveston, H. & S. A. R. Co. v. Texas, 210 U. S. 217. And this court must determine for itself by independent inquiry whether the tax here is what, in form and by the decision of the state court, it is declared to be, namely, an excise tax on the privilege of doing business, or, under the guise of that designation, is in substance and reality a tax on the income derived from tax exempt securities. If, by varying the form,—that is, to say, if, by using one name for a tax instead of another, or imposing a tax in terms upon one subject when another is in reality aimed at, the substance and effect of the imposition may be changed, constitutional limitations upon powers of taxation would come to naught." *Macallen v. Massachusetts*, 279 U. S. 620.

The ruling in the cited case is applicable. Here the State, because of constitutional limitations, *Sheffield v. Hogg*, 77 S. W. (2) 1021, infra p. 54, cf. *Swiss Oil Corporation v. Shanks*, 273 U. S. 407, is denied the right to levy the tax directly, as a tax on the royalty interest. This much the state courts concede. However the courts join the legislature and appellees in declaring that "*for the purpose of levying a gross production or occupation tax on oil, the legislature may validly declare the owners of royalty interests in the oil produced to be engaged in the occupation or business of producing oil.*" This declaration is made, we repeat, in face of the agreed and admitted fact that the appellants are not so engaged, and under the terms of their leases, as construed by the Texas courts, they have no right to engage therein, or to have possession of the property for such purpose, during the term of the lease. The evasion in this is

apparent, but it is the evasion which brings the law and decision into constitutional difficulty.

The requirement to pay an occupation tax can be predicated only upon the exercise of the privilege taxed. Lessors not enjoying or exercising that privilege cannot, consistently with due process, be compelled to pay it, by a mere definition. "While the lawmaker is entirely free to ignore the ordinary meaning of words and make definitions of his own * * * that device may not be employed so as to change the nature of the acts or things to which the words are applied," *Carter v. Carter Coal Co.*, 297 U. S. ..... Occupation taxes or excises may be levied upon proper subjects, but the legislative power cannot, consistently with due process, be employed to arbitrarily create the conditions under which liability shall exist, irrespective of the truth. To define as producers people who are not producers, in order to levy a producer's privilege tax upon them is the grossest sort of confiscation. "Mere legislative fiat may not take the place of facts in the determination of issues involving life, liberty or property." *Manley v. Georgia*, 279 U. S. 1, cf. *Dawson v. Kentucky Distilleries*, supra.

The Legislature cannot for the same reasons ignore substantial facts and say all carriers for hire are common carriers, *Smith v. Cahoon*, 283 U. S. 553; *Frost v. R. R. Comm. of Cal.*, 271 U. S. 583; *Mich. Comm. v. Duke*, 266 U. S. 570; *Washington v. Kuykendall*, 275 U. S. 207, cf. *Stephenson v. Binford*, 287 U. S. 251, or by legislative fiat create a conclusive presumption, *Schlesinger v. Wis.*, 270 U. S. 230, or by the same means convert a private business into a public utility, *Producers Trans. Co. v. R. R. Comm.*, 251 U. S. 228, 230, as the ice business, *New State Ice Co. v. Leib-*

mann, 285 U. S. 262; or declare business affected with a public interest, *Tyson & Bro. v. Banton*, 273 U. S. 418. See also *Eisner v. Macomber*, 252 U. S. 189, where Congress was held to be without power to say that stock dividends were income, when they are not such in fact. So in *Weaver v. Palmer Bros.*, 270 U. S. 402, it was held a law prohibiting the use of shoddy in the manufacture of bedding was unconstitutional as applied, when it was shown shoddy was not dangerous to health when sterilized, notwithstanding the Legislature's declaration to the contrary. And, in *Carter v. Carter Coal Co.*, supra, a penalty was held to be such regardless of the fact Congress called it a tax and a congressional declaration that the Guffey Coal Act regulated interstate commerce was set aside when it appeared such was not its substantial effect.

These illustrations bring to mind a statement once made by Daniel Webster:

> "I have only to remark that neither a preamble, nor any other declaration of a legislative body, can create a fact or alter a fact. I remember to have heard Chief Justice Marshall ask counsel who was insisting upon the authority of an act of legislation if he thought an act of legislation could create or destroy a fact, or change the truth of history. Would it alter the fact, said he, if a legislature should solemnly enact, that Mr. Hume never wrote the history of England? A legislature may alter the law but no power can reverse a fact." Vol. 2, Webster's Works (1851) page 334.

SECOND: The law violates the obligation of contract clause. Of course, if the question were simply one of taxing property or privileges appellants owned

and enjoyed, they could not escape the taxing power, *Lake Superior Consolidated Mines v. Lord*, 271 U. S. 577, 581. Such is not the case.

Appellants conveyed to their lessee the exclusive right to engage in the business of producing oil on the leased land. The lessee agreed to bear the cost of enjoying that privilege. For eight years the lessee paid the gross production tax on all oil produced. Then the Legislature amended the law, and in the face of our contract, says lessor must now bear a part of the same occupation tax. It ignores the fact the lessee voluntarily assumed and for years bore this burden, under the terms of the lease and could not require appellants to bear part of it.

The obvious purpose of the challenged law is to so spread the tax on the exclusive privilege enjoyed by the lessee, of engaging in the business of producing oil under the leases, or that lessees' tax burden will be lightened in the proportion that the lessee owns less than one hundred per cent of the oil, at lessor's expense.

Under the law an amount equal to 1/8th of 2% is inevitably added to the lessee's income under the lease. This identical sum is taken from the income the lessor is entitled to under the terms of the lease. The lessee now delivers the royalty oil to the pipe line, charged with a part of the tax on its privilege of engaging in the business of producing oil, not "free of cost" as the lease stipulates.

Aside from the fact that this is taking one man's property and giving it to another, both the taking and giving are directly in the teeth of a written obli-

gation, voluntarily assumed by the one thus benefitted. The lease obligates the lessee to pay the tax on the exclusive privilege enjoyed by him of engaging in the business or occupation of producing oil on the leased premises. This is the obligation the State has no right to impair; it is the obligation impaired by the law in question.

> "A change of the expressed stipulations of a contract, or a relief of a debtor from strict and literal compliance with its requirements, can no more be effected by an exertion of the taxing power than it can be by the exertion of any other power of a State Legislature. The constitutional provision against impairing contract obligations is a limitation upon the taxing power, as well as upon all legislation, whatever form it may assume. Indeed, attempted state taxation is the mode most frequently adopted to affect contracts contrary to the constitutional inhibition. It most frequently calls for the exercise of our supervisory power."

> "The State may undoubtedly tax" a creditor "if its promise be left unchanged. A tax thus laid impairs no obligation assumed. It leaves the contract untouched. But until payment of the debt or interest has been made, as stipulated, we think no act of State sovereignty can work an exoneration from what has been promised to the creditor, namely: payment to him, without a violation of the Constitution." *Murray v. Charleston*, 96 U. S. 432.

Even if the law did no more than prescribe a *method* of spreading the tax, and left the lessor the right to collect the deducted amounts from the lessee—a speculation we cannot indulge—it would be bad for:

"The obligation of a contract depends upon its terms and the means which the law in existence at the time affords for its enforcement. A law which alters the terms of a contract by imposing new conditions, or dispensing with those expressed, is a law which impairs its obligation, for as stated on another occasion, such a law relieves the parties from the moral duty of performing the original stipulations of the contract, and it prevents their legal enforcement." *Cleveland P. & A. R. R. Co. v. Pennsylvania*, 15 Wall, 82 U. S. 300.

Cases recently decided, *Home Building & Loan Association v. Blaisdell*, 290 U. S. 298, *Langever v. Miller*, 76 S. W. (2) 1025, 96 A. L. R. 836, make it entirely plain that the obligation of the contract is violated, if its value is in anywise lessened or if the manner of enforcing it is materially changed, or if new burdens are added, or rights released, or lessened, or if remedies are made more onerous.

"There is no more important provision in the Federal Constitution than the one which prohibits states from passing laws impairing the obligation of contracts, and it is one of the highest duties of this court to take care the prohibition shall neither be evaded nor frittered away. Complete effect must be given to it in all its spirit. The inviolability of contracts, and the duty of performing them, as made, are foundations of all well ordered society and to prevent the removal or disturbance of these foundations was one of the great objects for which the Constitution was framed." *Murray v. Charleston*, supra.

CONCLUSION

We do not believe the Legislature had authority, consistently with due process, to ignore substantial facts and *"declare the owners of royalty interests in the oil produced to be engaged in the business or occupation of producing oil for the purpose of levying the occupation tax against them"* which, under the lease and law prior to its amendment was payable by the lessee. What the Court said in *Washington v. Kuykendall*, 275 U. S. 207, regarding a legislative declaration is apt: "They are common carriers, not because of legislative fiat, but by reason of the character of business they carry on. * * * A common carrier is such by virtue of his occupation, not by virtue of the responsibilities under which he rests." To which we add, he is such by virtue of his occupation and not by virtue of his property rights.

The Legislature did not intend by the amended law to increase or decrease the amount of the State's revenue, but clearly intended to relieve lessees of part of the burden they voluntarily assumed in making their leases, and put that burden on lessors, and to that extent deprive lessors of their revenue and rights under leases. The Constitution was designed to protect contracts from such impairment.

We respectfully submit the judgment of the Court of Civil Appeals should be reversed.

WILLIAM R. WATKINS,
Attorney for Appellants.

APPENDIX A

THE DANIEL PRODUCTION AND OCCUPATION TAX LAW

(Approved May 22, 1933)

H. B. No. 154

Be it enacted by the Legislature of the State of Texas:

SECTION 1.[1] (1) For the purpose of this Act "producer" shall mean any person or persons, corporation, partnership, individual, trustee, receiver, trust estate or administrator owning, controlling, managing, or leasing any oil well, or any person who produces in any manner any oil by taking it from the earth or waters in this State.

(2) "Purchaser" shall mean any individual, person, or persons, partnership, corporation, refinery, pipe line, or agent purchasing crude oil for any purpose or use within this State.

(3) "Carrier" shall mean the operator or owner of any means of transporting oil or any instrumentality that may now be used or come into use.

(4) "Oil" as used herein shall mean petroleum oil, mineral oil, or other oil taken from the earth.

(5) "Reports" shall mean any reports required to be furnished in this Act or that may be required by the Comptroller in the administration of this Act.

(6) "Person" shall mean and include any person, firm, concern, receiver, trustee, executor, administrator, agent, institution, association, partnership, company, corporation, and persons acting under declarations of trust as well as the trustees acting under such declarations of trust.

(7) "Production" or "total oil produced" shall mean the total gross amount of oil produced including all royalty or other interest; that is, the amount for the purpose of the tax imposed by this article shall be measured or determined by tank tables compiled to show one hundred per cent (100%) of the full capacity of tanks without deductions for base sedi-

1. Amended, infra p. 42.

ment, overage, losses in handling, or for any other purpose; or if amount of oil produced has been measured or determined by tank tables compiled to show less than one hundred per cent (100%) of the full capacity of tanks, then such amount shall be raised to a basis of one hundred per cent (100%) for the purpose of the tax imposed by this article.

(8) "Comptroller" shall mean Comptroller of Public Accounts of the State of Texas.

(9) "Commission" as used in this Act shall mean the Railroad Commission of Texas.

SEC. 2.[1] (1) There is hereby levied an *occupation tax* on oil produced within the State of two (2) cents per barrel of forty-two (42) standard gallons. Said tax shall be computed upon the total barrels of oil produced or salvaged from the earth or waters of this State without any deductions, and shall be based upon tank tables showing one hundred per cent (100%) of production and exact measurements of contents. Provided, however, that the occupation tax herein levied on oil shall be two per cent (2%) of the market value of said oil whenever the market value thereof is in excess of one dollar ($1) per barrel of forty-two (42) standard gallons. The market value of oil, as that term is herein used, shall be the actual value thereof, plus any bonus or premium, or other thing of value paid therefor or which such oil does or will reasonably bring, if produced in accordance with the laws, rules, and regulations of the State of Texas. (Italics ours).

(2) The tax hereby levied shall be a liability of the producer of oil and it shall be the duty of such producer to keep accurate records of all oil produced, making monthly reports under oath as hereinafter provided.

(3) The purchaser of oil shall pay the tax on all oil purchased and deduct tax so paid from payment due producer or other interest holder, making such payments so deducted to the Comptroller of Public Accounts by legal tender or cashier's check payable to the State Treasury.

Provided, that if oil produced is not sold during the month in which produced, then said producer shall pay the tax at the same rate and in the manner as if said oil were sold.

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1. Amended, infra p. 38.

(4) The tax herein levied shall be paid monthly on the 15th day of each month on all oil produced during the month next preceding by the purchaser or the producer, as the case may be, but in no event, shall a producer be relieved of responsibility for the tax until same shall have been paid; and provided, in event the amount of the tax herein levied shall be withheld by a purchaser from payments due a producer and said purchaser fails to make payment of the tax to the State as provided herein, the producer may bring legal action against such purchaser to recover the amount of tax so withheld, together with penalties and interest which may have accrued by failure to make payments and shall be entitled to reasonable attorney fees and court costs incurred by such legal action.

(5) Provided that unless such payment of tax on all oil produced during any month or fractional part thereof shall be made on or before the 15th of the month immediately following, such payment shall become delinquent and a penalty of 10 per cent (10%) of the amount of the tax shall be added; such tax and penalty shall bear interest at the rate of six per cent (6%) per annum from date due until date paid.

(6) The tax herein levied shall be borne ratably by all interested parties, including royalty interests; and producers and/or purchasers of oil are hereby authorized and required to withhold from any payments due interested parties, the proportionate tax due.

(7) The taxes herein provided for, when paid, shall be, and hereby are, allocated as follows, to-wit:

One-half of said tax when and as received by the Comptroller shall be paid to the State Treasurer of Texas and be placed to the credit of the Public School Fund, and one-half of such taxes when and as received by the Comptroller shall be paid to the State Treasurer to be placed to the credit of the General Fund of the State.

SEC. 3.[1] (1) Producers and/or purchasers of oil shall keep in Texas a complete record of all oil produced and a record of all oil sold; reports shall be filed with the Comptroller monthly by producers and purchasers, not later than the 15th of each

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1. Amended, infra pp. 40, 45.

calendar month, showing the amount of oil produced and the amount of oil sold during the month preceding, upon forms furnished by the Comptroller.

(2) All railroads, barges, trucks or pipe lines, carrying or transporting oil for hire, for themselves or their owners, shall keep in Texas a complete and accurate record of all oil so handled by months, showing date received, number of barrels, of whom received, point of delivery, to whom delivered and manner of transportation, and such records shall be open to the inspection of the duly authorized agents of the Comptroller or the Attorney General at all times, and, if requested by the Comptroller, shall furnish information and reports of movements as often as required by the Comptroller.

SEC. 4. Purchasers buying oil from properties in litigation or in receivership, bankruptcy, or any other legal proceedings, or covered by assignments, are required to deduct the amount of the taxes levied by this Act, before payment is made to the producers, trustees, assignees or to any person who claims ownership of said funds, or before the proceeds of said purchase of oil is impounded or escrowed by said purchaser pending such litigation or tenure of assignments, and shall remit said tax deducted in the same manner as if said oil had been purchased from any other source, and providing that said purchaser shall not be liable to any claimant of said funds on account of payment of said tax.

SEC. 5.[1] (1) Monthly reports by producers shall be filed with the Comptroller upon such forms as may be designated by that official, showing the total number of barrels of oil produced monthly, per well per calendar day, the name of the county from which produced, the name of the lease from which produced, the disposition made of such oil; if sold, the name and correct address of the purchaser, and if not sold, the location of storage, if owned by such operator, or if stored with a pipe line or a refinery, the correct name and address of such pipe line or refinery. All reports so made shall be duly sworn to by the producer or his authorized agent. The monthly report herein mentioned shall not be made on a per well per day

1. Amended, infra pp. 40, 48.

basis on wells producing an average of less than forty (40) barrels per day.

(2) Purchasers of oil shall accompany the remittance for taxes deducted from settlements as provided herein, with a statement or report in a form to be prescribed by the Comptroller, showing complete information requested in such form, including name and address of producer from whom oil was purchased; name of the county from which such oil was produced; name of the lease and the total number of barrels purchased.

SEC. 6.[1] For the occupation tax, penalties and interest herein provided for, the State shall have a prior and preferred lien on any leasehold interest, ownership of the oil rights, or interest, including oil produced and oil runs owned by the person owing any tax herein, and in addition thereto such lien shall include equipment, tools, tanks, and all other implements used on said lease from which oil is produced.

SEC. 7. It shall be the duty of the Attorney General to bring legal action for the collection of delinquent taxes herein levied, and a suit instituted shall attach to oil in storage, in transit, or being produced by such operator, and venue for such suits herein provided shall be in the district court of Travis County, Texas.

SEC. 8.[2] Whoever, as producer, purchaser, or carrier, or whoever, as the agent, employe, or representative of a producer, purchaser, or c rier, fails or refuses to comply with the provisions of this Act to keep records herein required to be kept, or whoever wilfully makes erroneous reports, as herein required to be made, or refuses to submit to examination of records by any authorized representative of the Comptroller or Attorney General, shall be guilty of a misdemeanor, and shall be punished by a fine of not less than twenty-five dollars ($25), nor more than five thousand dollars ($5,000), or confined in the county jail for not less than one (1) month nor more than six (6) months, or by both such fine and imprisonment.

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1. Amended, infra, p. 48.
2. Amended, infra p. 49.

SEC. 9.[1] It shall be the duty of the Comptroller to promulgate rules and regulations governing the detail administration of the terms and requirements of this Act not specifically mentioned herein; to employ auditors or tax supervisors for the purpose of verifying reports and investigating the affairs of producers and/or purchasers to determine whether the tax is being properly reported and paid; to provide necessary office help and equipment for the proper execution of the provisions of this Act, and for the purpose of defraying the necessary expense of said administration including salaries of supervisors, auditors, office help, filing equipment, typewriters and supplies, printing of forms, publication of regulations, postage, telephone and telegraph, travleing expenses of employees and traveling expenses of witnesses not otherwise paid, the amount of such expenses to be deducted from the gross amount collected monthly.

SEC. 9-a. Each and every person appointed by the commission and holding the certificate of the commission authorizing such appointee to inspect oil wells, oil leases, pipe lines, railroad cars, or tanks shall have the right of free access to such leases, premises, wells, pipe lines, railroad cars, or tanks, and to motor truck tanks, at any and all times for the purpose of inspection with respect to the production and transportation of oil. Any person or owner producing oil in this State who shall by objection, interference, or otherwise prevent any such person so appointed by the commission from the free right of access to any leases or premises or wells where oil is produced, or who shall in any manner interfere with such representative's examination of any such leases, premises, or wells to ascertain the quantity and time of production of oil, shall be guilty of a misdemeanor, and upon conviction thereof shall be subject to a fine of not exceeding five hundred dollars ($500) or by imprisonment in the county jail not exceeding six (6) months or by both such fine and imprisonment.

SEC. 9-b. It shall be unlawful for any person owning, leasing, operating, or controlling any oil property within the State of Texas to permit the oil or gas so produced to pass beyond the possession or control of such person into the possession or control of any other person without first accurately

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1. Amended, infra pp. 41, 49.

measuring the amount of such oil or such gas, and making and preserving an accurate record thereof. It shall also be unlawful for any person to use any method or device to evade such accurate measurement. Upon conviction for a wilful violation of any provision hereof, such person shall be deemed guilty of a felony and, upon such conviction, shall be punished by confinement in the State penitentiary for a term of not less than two (2) nor more than four (4) years.

Approved May 22, 1933.
Effective 90 days after adjournment.

(NOTE: H. B. No. 154 passed the House by a vote of 93 yeas, 26 nays; passed the Senate by a vote of 26 yeas, 2 nays. In approving this and H. B. No. 844 the Governor suggested appropriate legislation be enacted to harmonize the two laws before adjournment. These corrective bills will appear in later volumes of this series.)

PAYMENT OF PRODUCTION TAX ON OIL PROVIDED

(Approved October 13, 1933)

H. B. No. 55

CHAPTER 12

Be it enacted by the Legislature of the State of Texas:

SECTION 1. Section 2 of Chapter 162, H. B. No. 154,, Acts of the Forty-third Legislature, Regular Session, is hereby amended so as to hereafter read as follows:

"Sec. 2. (1) There is hereby levied an *occupation tax* on oil produced within this State of two (2) cents per barrel of forty-two (42) standard gallons. Said Tax shall be computed upon the total barrels of oil produced or salvaged from the earth or waters of this State without any deductions, and shall be based upon tank tables showing one hundred percent (100%) of production and exact measurements of contents. Provided however, that the occupation tax herein levied on oil shall be two per cent (2%) of the market value of said oil whenever the market value thereof is in excess of One Dollar ($1.00) per barrel of forty-two (42) standard gallons. The market value of oil, as that term is herein used, shall be

the actual market value thereof, plus any bonus or premium, or other thing of value paid therefor or which such oil does or will reasonably bring, if produced in accordance with the laws, rules and regulations of the State of Texas. (Italics ours).

"(2) The tax hereby levied shall be a liability of the producer of oil and it shall be the duty of such producer to keep accurate records of all oil produced; making monthly reports under oath as hereinafter provided.

"(3) The purchaser of oil shall pay the tax on all oil purchased and deduct tax so paid from payment due producer or other interest holder, making such payments so deducted to the Comptroller of Public Accounts by legal tender or cashier's check payable to the State Treasury.

"Provided, that if oil produced is not sold during the month in which produced, then said producer shall pay the tax at the same rate and in the manner as if said oil were sold.

"(4) The tax herein levied shall be paid monthly on the 25th day of each month on all oil produced during the month next preceeding by the purchaser or the producer as the case may be, but in no event, shall a producer be relieved of responsibility for the tax until same shall have been paid; and provided, in event the amount of the tax herein levied shall be withheld by a purchaser from payments due a producer and said purchaser fails to make payment of the tax to the State as provided herein, the producer may bring legal action against such purchaser to recover the amount of tax so withheld, together with penalties and interest which may have accrued by failure to make payments and shall be entitled to reasonable attorney fees and Court costs incurred by such legal action.

"(5) Provided that unless such payment of tax on all oil produced during any month or fractional part thereof shall be made on or before the 25th of the month immediately following, such payment shall become delinquent and a penalty of ten percent (10%) of the amount of the tax shall be added; such tax and penalty shall bear interest at the rate of six percent (6%) per annum from date due until date paid.

"(6) The tax herein levied shall be borne ratably by all interested parties, including royalty interests; and producers and/or purchaser of oil are hereby authorized and required to withhold from any payment due interested parties, the proportionate tax due.

"(7) The taxes herein provided for, when paid shall be, and hereby are, allocated as follows, to-wit:

"One-half of said tax when and as received by the Comptroller shall be paid to the State Treasurer of Texas and be placed to the credit of the Public School Fund, and one-half of such taxes when and as received by the Comptroller shall be paid to the State Treasurer to be placed to the credit of the General Fund of the State."

SEC. 2. Section 3 of Chapter 162, H. B. No. 154, Acts of the Forty-third Legislature, Regular Session is hereby amended so as to hereafter read as follows:

"Sec. 3.[1] (1) Producers and/or purchasers of oil shall keep in Texas a complete record of all oil produced and a record of all oil sold; reports shall be filed with the Comptroller monthly by producers and purchasers, not later than the 25th of each calendar month, showing the amount of oil produced and the amount of oil sold during the month preceding, upon forms furnished by the Comptroller.

"(2) All railroads, barges, trucks or pipe lines, carrying or transporting oil for hire, for themselves or their owners shall keep in Texas a complete and accurate record of all oil so handled by months, showing date received, number of barrels, by whom received, point of delivery, to whom delivered and manner of transportation and such records shall be open to the inspection of the duly authorized agents of the Comptroller or the Attorney General at all times, and, if requested by the Comptroller, shall furnish information and reports of movements as often as required by the Comptroller."

SEC. 3.[2] Section 5 of Chapter 162, H. B. No. 154, Acts of the Forty-third Legislature, Regular Session, is hereby amended so as to hereafter read as follows:

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1. Amended, infra p. 45.
2. Amended, infra p. 48.

"Sec. 5. (1) Monthly reports by producers shall be filed with the Comptroller upon such forms as may be designated by that official, showing the total number of barrels of oil produced monthly, the name of the county from which produced, the name of the lease from which produced, the disposition made of such oil if sold, the name and correct address of the purchaser, and if not sold, the location of storage, if owned by such operator, or if stored with a pipe line or a refinery, the correct name and address of such pipe line or refinery. All reports so made shall be duly sworn to by the producer or his authorized agent.

"(2) Purchasers of oil shall accompany the remittance for taxes deducted from settlements as provided herein, with a statement or report in a form to be prescribed by the Comptroller, showing complete information requested in such form, including name and address of producer from whom oil was purchased; name of the county from which such oil was produced; name of the lease and the total number of barrels purchased."

SEC. 4. Section 9 of Chapter 162, H. B. No. 154, Acts of the Forty-third Legislature, Regular Session, is hereby amended so as to herafter read, as follows:

"Sec. 9.[1] It shall be the duty of the Comptroller to promulgate rules and regulations governing the detail administration of the terms and requirements of this Act not specifically mentioned herein; to employ auditors or tax supervisors for the purpose of verifying reports and investigating the affairs of producers and/or purchasers to determine whether the tax is being properly reported and paid; to provide the necessary office help and equipment for the proper execution of the provisions of this Act, and for the purpose of defraying the necessary expense of said administration, including salaries of supervisors, auditors, office help, filing equipment, typewriters and supplies, printing of forms, publication of regulations, postage, telephone and telegraph, traveling expenses of employees, and traveling expenses of witnesses not otherwise paid; that the following sums of money, or as much thereof as may be necessary, be and the same are hereby appropriated

1. Amended, infra p. 49.

out of said amount of taxes collected as herein set out for the support and maintenance of the gross production tax division of the Comptroller's office for the two (2) year period beginning September 1, 1933, and ending August 31, 1935.

SEC. 5. The fact that the Forty-third Legislature in enacting said Act failed to provide sufficient time to permit computation and payment of the tax before same becomes delinquent, and the fact that said Forty-third Legislature failed to appropriate sufficient funds for employees in said division sufficient to adequately enforce said Act so that at the present time the Comptroller is hampered in the performance of such duties by insufficient help, create an emergency and an imperative public necessity that the Constitutional Rule that all bills be read on three several days in each House be suspended, and said Rule is hereby suspended, and this Act shall take effect and be in force from and after its passage, and it is so enacted.

OIL TAXES WITH PENALTIES FOR EVASION

(Approved May 30, 1935)

H. B. No. 89

Be it enacted by the Legislature of the State of Texas:

SECTION 1. That Section 1, of Chapter 162, House Bill 154, Acts of the Forty-third Legislature, Regular Session, referred to herein as Chapter 162, is hereby amended so as to hereafter read as follows:

"Section 1. (1). For the purpose of this Act 'producer' shall mean any person owning, controlling, managing or leasing any oil well and/or any person who produces in any manner any oil by taking it from the earth or waters in this State, and shall include any person owning any royalty or other interest in any oil or its value whether produced by him, or by some other person on his behalf, either by lease, contract or otherwise.

"(2). 'First purchaser' shall mean any person purchasing crude oil from the producer.

"(3). 'Subsequent purchaser' shall mean any person operatnig any reclamation plant, topping plant, treating plant, refinery, and/or any kind or character of processing plant, or anyone who purchases oil for any purpose whatsoever, when said oil is purchased from any person other than the producer.

"(4). 'Carrier' shall mean the owner, operator, or manager of any means of transporting oil or any instrumentality that may now be used or come into use.

"(5). 'Oil' shall mean crude oil, or other oil taken from the earth, regardless of gravity of the oil.

"(6). 'Report' shall mean any report required to be furnished in this Act or that may be required by the Comptroller in the administration of this Act.

"(7). 'Person' shall include any person, firm, concern, receiver, trustee, executor, administrator, agent, institution, association, partnership, company corporation, and persons acting under declarations of trust as well as the trustees acting under said declarations of trust.

"(8). 'Production' or 'total oil produced' shall mean the total gross amount of oil produced including all royalty or other interest; that is, the amount for the purpose of the tax imposed by this Article shall be measured or determined by tank tables compiled to show one hundred (100) per cent of the full capacity of tanks without deductions for overage or losses in handling. Allowance for any reasonable and bona fide deduction for basic sediment and water, and for correction of temperature to sixty (60) degrees Fahrenheit will be allowed. If the amount of oil produced has been measured or determined by tank tables complied to show less than one hundred (100) per cent of the full capacity of tanks, then such amount shall be raised to a basis of one hundred (100) per cent for the purpose of the tax imposed by this Article.

"(9). 'Royalty owners' shall mean and include all persons owning any mineral rights under any producing leasehold within this State, other than the working interest, which working interest is that of the person having the management and operation of the well.

"(10). 'Comptroller' shall mean Comptroller of Public Accounts of the State of Texas.

"(11). 'Commission' shall mean the Railroad Commission of Texas.

"(12). The Tax herein imposed on the producing of crude petroleum shall be the primary liability of the producer as hereinbefore defined, and every person purchasing crude petroleum from the producer thereof and taking delivery thereof at the premises where produced shall collect said tax imposed by this Act from the producer. Every purchaser, including the first purchaser and the subsequent purchaser, required to collect any tax under this Act, shall make such collection by deducting and withholding the amount of such tax from any payments made by such purchaser, to the producer, and remit same as herein provided. This Section shall not affect any pending law suit in the State of Texas, or any lease agreement or contract now or that hereafter may be in affect between the State of Texas or any political subdivision thereof and/or The University of Texas and any oil producer.

"(13). When it shall appear that a taxpayer to whom the provisions of this Act shall apply has erroneously paid more taxes than were due during any taxpaying period either on the account of a mistake of fact or law, it shall be the duty of the State Comptroller to credit the total amount of taxes due by such taxpayer for the current period with the total amount of taxes so erroneously paid.

"(14). The tax hereby levied shall be a liability upon the producer, the first purchaser, and/or subsequent purchaser or purchasers as herein provided.

"(15). The tax hereby levied shall be paid by the first purchaser purchasing the same from the producer, who shall deduct the same from the amount paid producer, as aforesaid, provided, however, that the failure of first purchaser to pay said tax shall not relieve the producer from the payment of same, nor shall it relieve any subsequent purchaser from the payment of same, where the first purchaser does not account for and pay said tax, and the State shall have a lien on all of the oil produced in Texas in the hands of the producer, the

first purchaser and any subsequent purchaser to secure the payment of the tax due, and it shall be the duty of every person purchasing oil produced in Texas to satisfy himself or itself that the tax on said oil has been or will be paid by the persons primarily liable therefor.

"(16). If the oil produced by said producer is not sold during the month in which it is produced, then said producer shall pay the tax at the same rate and in the same manner as if said oil were sold during said month. In such case, however, the working interest operator may pay such tax and deduct it from the interest of the other interest holders."

SEC. 2. Section 3 of said Chapter 162, as amended by House Bill 55, Chapter 12, Acts of the First Called Session of the Forty-third Legislature be and the same is hereby amended so as to hereafter read as follows:

"Section 3. (1). A complete record shall be kept by every producer of oil within this State, said records to show the county or counties in which said producer operates, the correct name or names of the lease or leases from which oil is produced, the total number of barrels of oil produced from each lease, the correct name and address of the first purchaser, the total number of barrels of oil sold or delivered to each first purchaser and the price received therefor. And in addition shall keep a record of all oil used on the lease from which said oil is produced or which may be refined or processed in any manner by the producer upon the lease from which said oil is produced; and if said oil is not sold, the location of storage and the total number of barrels in storage, if owned by such operator, or if stored with a pipe line or a refinery, the correct name and address of such pipe line or refinery.

"(2). Every producer shall file monthly on the 25th day of each month with the Comptroller under oath of the producer or his duly authorized agent a report showing the total number of barrels of oil produced by said producer during the month preceding the date of the report, the county in which the oil is produced, the correct name of the lease from which the oil is produced, the correct name and address of the first

purchaser of said oil and the price received therefor, and such other information as Comptroller may require; said records and reports shall be open to the inspection of the Comptroller or the Attorney General or the duly authorized agents of the Comptroller or Attorney General.

"(3). Every first purchaser shall keep in Texas records showing the correct name and address of the producer from whom said first purchaser buys oil, the county in which said oil is produced, the true and correct name of the lease from which said oil is produced, the total number of barrels bought, and the price paid therefor; and in addition shall keep a record showing the total number of barrels of said oil purchased and used, refined, or processed in any manner by said first purchaser and the total number of barrels of oil sold by him, the price received therefor, and the true and correct name and address of the subsequent purchaser of said oil. On the 25th day of each month each and every first purchaser of oil shall file with the Comptroller, under oath of the first purchaser or his duly authorized agent, a report showing the total number of barrels of oil purchased during the preceding month, the price paid therefor, the correct name and address of the producer or producers from whom said oil purchased, the county in which the oil was produced, and the correct name of the lease from which said oil was produced, and such other information as Comptroller may require; said records and reports shall be open to the inspection of the Comptroller and/or Attorney General or their duly authorized agents.

"(4.) Each and every subsequent purchaser, shall keep in Texas a record showing the correct name and address of each first purchaser or subsequent purchaser from whom any oil is bought, the total number of barrels purchased and the price paid therefor, the date of purchase, the disposition of said oil, the total number of barrels used, refined, or processed in any manner by said subsequent purchaser, and if sold shall show the correct name and address of the subsequent purchaser to whom said oil is sold or delivered and the date of said sale and/or delivery, and the price received therefor.

"(5) Each and every subsequent purchaser shall file with the Comptroller on the 25th day of each month a report under

oath of the subsequent purchaser or a duly authorized agent showing the correct name and address of the person from whom said subsequent purchaser has bought oil during the preceding month, the total number of barrels purchased, the price paid therefor, and the disposition of said oil; said reports to show the total number of barrels of oil used, refined, or processed in any manner by said subsequent purchaser and the correct name and address of any subsequent purchaser to whom said oil was sold and the number of barrels sold, and the price received therefor; said records and reports shall be open to the inspection of the Comptroller or the Attorney General or the duly authorized agents of the Comptroller or Attorney General.

"(6) Royalty owners shall only keep a record of all moneys received as royalty from any producing leasehold within this State. They shall also keep a copy of all settlement sheets furnished them by the purchaser or operator or any other statement showing the number of barrels of oil from which royalty was received and the amount of tax deducted; said records shall be open to the inspection of the Comptroller or the Attorney General or their duly authorized agents.

"(7) Every carrier, including all railroads, barges, trucks, or pipe lines, carrying or transporting oil for hire, for themselves or their owners, shall keep in Texas a complete and accurate record of all oil so handled by months, showing date received, number of barrels, of whom received, point of delivery, to whom delivered and manner of transportation, and such records shall be open to the inspection of the duly authorized agents of the Comptroller or the Attorney General at all times, and, if requested by the Comptroller, shall furnish information and reports of movements as often as required by the Comptroller; provided however, that nothing in this bill imposing a tax on those enjoying the privilege herein taxed shall be construed as impairing any contract whereby any interest holder or other person has agreed to pay any part of the tax in the past or in the future, but said tax is imposed on all of said interest holders as their interests appear and shall be paid as herein provided, and this Act is not

intended to relieve any person of any contractual liability whatsoever."

SEC. 3. That Section 5 of said Chapter 162, as amended by House Bill 55, Chapter 12, Acts of the First Called Session of the Forty-third Legislature, be and the same is hereby amended so as to hereafter read as follows:

"Section 5. (1) At the time of filing the reports herein required, the first purchaser shall pay to the Comptroller by legal tender or cashier's check, payable to the State Treasurer, the tax herein required to be paid. Failure to pay said tax on the twenty-fifth day of the month immediately following, shall cause said tax to become delinquent and a penalty of ten (10) per cent of the amount of said tax shall be added, such tax and penalty to bear interest at the rate of six (6) per cent per annum from the date due until the date paid."

SEC. 4. That Section 6 of said Chapter 162 be and the same is hereby amended so as to hereafter read as follows:

"Section 6. (1) For the tax, penalties and interest herein provided for, the State shall have a prior and preferred lien on every leasehold interest, ownership of the oil rights, or the value of oil rights or other interest, including oil produced and oil runs owned by the person owing any tax herein, and in addition thereto such lien shall include equipment, tools, tanks, and all other implements used on said lease from which oil is produced. Said lien shall extend to and be enforceable against any property, either real or personal, or both, owned by any person or persons made liable for the tax herein levied, which property is not exempt from forced sale by reason of existing laws or the Constitution of this State. It is further provided that when any oil is discovered upon which the tax herein provided for has not been paid as and when provided for herein, any sheriff, ranger or other peace officer is authorized to levy on said oil by notice to the owner or other person in charge, that said oil is levied on for taxes due on it and after ten (10) days notice posted at the site of the oil, said officer shall proceed to sell said oil to the highest bidder for cash. Any money received for said oil in excess of the taxes and ten (10) per

cent commission to the officer selling the property, shall be paid by said officer to the owner of said oil. The officer selling same shall transmit the amount of the tax to the Comptroller or his duly authorized representative. Should the oil sold fail to sell for enough to pay said taxes, the officer selling same shall deduct ten (10) per cent of the amount received and forward the balance to the Comptroller. Provided however, that no ranger shall receive any commission for services performed in the enforcement of this provision."

SEC. 5. That Section 8 of said Chapter 162 be and the same is hereby amended so as to hereafter read as follows:

"Section 8. Whoever, as producer, first purchaser, subsequent purchaser, or carrier, or whoever shall as a principal or as agent or representative of such principal, knowingly make any false entries or fail to make any proper entries in the books required by this Act with intent to defraud the State; or whoever as such, shall knowingly make a false or incomplete report as required by this Act; or whoever, as such, shall knowingly fail or refuse to make the report required to be made; or whoever, as such, shall destroy, mutilate, or secrete any of the records required to be kept by the provisions of this Act; or whoever shall, as such, hide or secrete with intent to defraud, any of the property upon which a lien is created hereunder, or whoever fails or refuses to permit the Comptroller or the Attorney General or the duly authorized representative of either to inspect the records and reports herein provided for, shall be guilty of a misdemeanor and upon conviction thereof shall be fined in the sum of not less than Twenty-five Dollars ($25), nor more than Five Thousand Dollars ($5,000) or confined in the county jail for not less than one month, nor more than six (6) months, or by both such fine and imprisonment."

SEC. 6. That Section 9, Chapter 162, H. B. 154, Acts of the Regular Session of the Forty-third Legislature, as amended by Chapter 12, H. B. 55, First Called Session of the Forty-third Legislature, be and the same is hereby amended so as to hereafter read as follows:

"Section 9. (1). It shall be the duty of the Comptroller to promulgate rules and regulations governing the detail administration of the terms and requirements of this Act not specifically mentioned herein; to employ auditors and supervisors for the purpose of verifying reports and investigating the affairs of producers and/or purchasers to determine whether the tax is being properly reported and paid. Before any division or allotment of the occupation tax on oil collected under the provisions of this Act, is made one-half of one per cent of the gross amount of said tax shall be set aside in the Treasury subject to the use of the Comptroller in the administration and enforcement of the provisions of this Act, and so much of the said proceeds of one-half of one per cent of the occupation tax on oil paid monthly as may be needed in such administration and enforcement shall be expended in the amounts and for the purposes fixed by the Legislature in the General Appropriation Bill. Any unexpended portion of said fund so specified shall at the end of the fiscal year revert to the respective funds or accounts in proper proportions to which the occupation tax on oil is proportioned at the end of the fiscal year; and provided that the Comptroller may appoint only six (6) additional supervisors or auditors. No salary to exceed those set out in the Department Appropriation Bill, for places of the same type of service.

"(2). Provided that said appropriation herein provided for shall include as a part of said one-half of one per cent of the said tax herein appropriated the appropriation made by the Regular Session of the Forty-third Legislature for said Comptroller's Department for the purpose herein mentioned."

SEC. 7. If any clause, section, provision or portion of this Act shall be held to be invalid or unconstitutional, such holding shall not affect any other section or clause of this Act.

SEC. 8. The fact that under existing Statutes the State is losing large sums of money by enormous tax evasions due to the ambiguity and inadequacies of said Act, the fact that by the passage of this bill the Comptroller will be able to ferret out such evasions and enforce the payment of taxes due the State, and said tax will be more uniform, create an emergency

and an impertive public necessity that the Constitutional Rule that all bills be read on three several days in each House be suspended, and said Rule is hereby suspended and this Act shall take effect and be in force from and after its passage, and it is so enacted.

Approved May 30, 1935.
Effective May 30, 1935.

(NOTE: H. B. No. 89 passed the House by a vote of 104 yeas, 2 nays; the Senate by 27 yeas, 1 nay.)

APPENDIX "B"

Vernon's Annotated Texas Statutes Art. 7071

1. Each person owning, controlling, managing, operating or leasing in this State any oil well, or any person who produces in any other manner any oil by taking it from the earth in this State, shall make quarterly on the first days of January, April, July and October of each year, a report to the Comptroller, under oath of such person or if the producer is other than a natural person, under oath of the president, treasurer, superintendent or person in charge of such production, showing the total amount of oil produced by such person from each well, or otherwise, during the quarter next preceding and the average market value thereof during said quarter. Each such person on said first days of January, April, July, and October shall pay to the Treasurer of this State an occupation tax for the quarter beginning on said date equal to two per cent of the value of the total amount of oil produced in this State by such person during the quarter next proceding such first days of January, April, July and October at the average market value thereof.

2. Each person mentioned and included in subdivision 1 of this article shall make, keep and preserve a full and complete record of all such oil produced in this State during the time so engaged in its production, and said record shall be open at all times to the inspection of all tax officers of this State. Any person failing to comply with this requirement

shall be subject to a penalty not less than five hundred and not more than fifteen hundred dollars payable to the State of Texas, and such penalty shall accrue for each ten days of failure to comply with this subdivision of said article and such penalty shall accrue for failure to comply with this subdivision with reference to each separate oil well.

3. In each report required to be made by this article such person making the same shall show in detail the disposition made of any such oil, if disposed of, and if not, shall show where it is stored. Said report shall show to whom any such oil was sold or delivered, the date of sale and delivery, the amount delivered to each, and shall show the name and location of the person, refinery, pipe line, establishment, plant, factory, railroad, institution or place to which or to whom delivery was made.

4. The word "person" as used in this article shall include any person, firm, concern, receiver, receivers, trustee, executor, administrator, agent, institution, association, partnership, company corporations, and persons acting under declarations of trust as well as the trustees acting under such declarations of trust.

5. The market value of oil as that term is used herein shall be the actual market value of the same, and among other things proper to be considered any bonus or premium paid or which the oil will reasonably bring shall not be excluded in arriving at the market value.

6. Any person failing to make proper and accurate report for thirty days from the date when said report is required herein to be made shall forfeit and pay to the State of Texas a penalty of ten per cent of the amount of the tax due for the quarter for which said report is required by law to be made.

7. Any person failing to pay any tax provided for herein within thirty days from the date when said tax is required herein to be paid shall forfeit and pay to the State of Texas a penalty of ten per cent upon the amount of such tax and six per cent interest upon the amount of such tax/and penalty from date when due and payable until paid.

8. The word "oil" as used in this law means petroleum oil, mineral oil, or other oil taken from the earth.

9. For the occupation tax, penalties and interest herein provided for, the State shall have a lien on any leasehold interest, ownership of the oil rights or interest owned by the person owing any tax herein provided for. (Acts 1907, p. 479; Acts 1919, p. 128; Acts 1923, 2nd C .S., p. 98).

APPENDIX "C"

CONSTITUTION OF TEXAS

(From Vernon's Annotated Texas Statutes "Constitution" - Vol. 2, pp. 476-503)

ARTICLE VIII.

SECTION 1. *Taxation shall be equal and uniform. All property in this State, whether owned by natural persons or corporations, other than municipal, shall be taxed in proportion to its value, which shall be ascertained as may be provided by law.* The Legislature may impose a poll tax. It may also impose *occupation taxes,* both upon natural persons and upon corporations, other than municipal, doing any business in this State. It may also tax incomes of both natural persons and corporations other than municipal, except that persons engaged in mechanical and agricultural pursuits shall never be required to pay an occupation tax. * * * * (Italics ours).

SECTION 2. All Occupation taxes shall be equal and uniform upon the same class of subjects within the limits of the authority levying the tax. * * * *.

SECTION 9. *The State tax on property, exclusive of the tax necessary to pay the public debt, and of the taxes provided for the benefit of the public free schools, shall never exceed thirty-five cents on the one hundred dollars valuation;* and no county, city or town shall levy more than twenty-five cents for city or county purposes, and not exceeding fifteen cents for roads and bridges, and not exceeding fifteen cents to pay jurors, on the one hundred dollars valuation. * * * *.

SECTION 11. *All property, whether owned by persons or corporations shall be assessed for taxation, and the taxes paid in the county where situated,* but the Legislature may, by a two-thirds vote, authorize the payment of taxes of non-residents of counties to be made at the office of the Comptroller of Public Accounts. And all lands and other property not rendered for taxation by the owner thereof shall be assessed at its fair value by the proper officer. * * * *

SEC. 18. *The Legislature shall provide for equalizing, as near as may be, the valuation of all property subject to or rendered for taxation,* (*The County Commissioners' Court to constitute a board of equalization*); and may also provide for the classification of all lands with reference to their value in the several counties.

SHEFFIELD vs. HOGG, 77 S. W. (2d) 1021, 1024, (Tex. Sup.) Decided December 31, 1934

Holds, that *a lessor's reserved royalty interest* in an oil and gas lease, in whatever form the reservation is made *is "an interest in land, subject to taxation* as such *in the counties in which the respective tracts of land are situated."*

And, in the same case (p. 1030) it is said that: "Under the contract, *the lessees having to pay all expenses of exploration and production,* each one-eighth out of their seven-eighth mineral interest was necessarily worth less than the one-eighth interest of the lessor."

NOTE: It was because of these Constitutional limitations upon the taxing power, that appellants believe the Court of Civil Appeals held that its construction of the law in question as an occupation tax on those interested in the oil produced in proportion to their respective interests therein, was "required to save it from the vice of unconstitutionality." (R. 50.)

APPENDIX "D"

Vernon's Annotated Texas Statutes (Supp.) Art. 7057-B

(Acts 1933, 43rd Legislature, page 637, Chapter 214)

(Art. 7057-b. *Payment of License or Privilege Taxes Under Protest*)

SEC. 1. Any person, firm or corporation who may be required to pay to the head of any department of the State Government any occupation, gross receipt, franchise, license or other privilege tax or fee, and who believes or contends that the same is unlawful and that such public official is not lawfully entitled to demand or collect the same shall, nevertheless, be required to pay such amount as such public official charged with the collection thereof may deem to be due the State, and shall be entitled to accompany such payment with a written protest, setting out fully and in detail each and every ground or reason why it is contended that such demand is unlawful or unauthorized.

(*Suits for Recovery of Taxes or Fees*)

SECTION 2. Upon the payment of such taxes or fees, accompanied by such written protest, the taxpayer shall have ninety (90) days from said date within which to file suit for the recovery thereof in any court of competent jurisdiction in Travis County, Texas, and none other. Such suit shall be brought against the public officials charged with the duty of collecting such tax or fees, the State Treasurer and the Attorney General. The issues to be determined in such suit shall be only those arising out of the grounds or reasons set forth in such written protest as originally filed. The right of appeal shall exist as in other cases provided by law. Provided, however, where a class action is brought by any taxpayer all other taxpayers belonging to the class and represented in such class action who have properly protested as herein provided shall not be required to file separate suits but shall be entitled to and goverened by the decision rendered in such class action.

(*Lists Remitted to State Treasurer.*)

SEC. 3. It shall be the duty of such public official to

transmit daily to the State Treasurer all money so received, with a detailed list of all those remitting same, and he shall inform the State Treasurer in writing that such money was paid under protest as hereinabove provided. A deposit receipt shall be issued by the Comptroller for the daily total of such remittances from each department; and the cashier of the Treasury Department shall keep a cash book to be called "Suspense Cash Book," in which to enter such deposit receipts. Upon the receipt of such money by the State Treasurer it shall be his duty and he is hereby required to immediately and forthwith place the same in State depositories bearing interest in the same manner as any other funds of the State required to be placed in such depositories at interest, and the State Treasurer shall further be required to allocate whatever interest is earned on such funds and to credit the amount thereof to such suspense account until the status of such money is finally determined as herein provided.

APPENDIX "E"

(Cases listed alphabetically)

APPLEBY v. NEW YORK, 271 U. S. 364:

"The questions we have here to determine are, first, was there a contract; second, what was its proper construction and effect, and third was its obligation impaired by subsequent legislation as enforced by the state court? These questions we must answer independently of the conclusion of that court. Of course we should give all proper weight to its judgment, but we cannot perform our duty to enforce the guaranty of the Federal Constitution as to the inviolability of contracts by state legislative action, unless we give the questions independent consideration. It makes no difference what the answer to them involves, whether it turns on issues of general or purely local law, we cannot surrender the duty to exercise our own judgment. In the case before us, the construction and effect of the contract involved in the deeds and covenants depended chiefly upon the extent of the power of the State and city to part with property under navigable waters to private persons, free from subsequent regulatory control of the water over the land and the land itself. That is a State question, and we must determine it from the law of the State, as it was when the deeds were executed, to be derived from statutes then in force and from the decisions of the courts then and since made, but we must give our own judgment derived from such sources and not accept the present conclusion of the State court without inquiry."

BLACK & WHITE TAXICAB & TRANSFER CO. v. BROWN & YELLOW TAXICAB & TRANSFER CO., 276 U. S. 518.

"The decree below should be affirmed unless Federal courts are bound by Kentucky decisions which are directly opposed to this court's determination of the principles of common law properly to be applied in such cases. Petitioner argues that the Kentucky decisions are persuasive and establish the invalidity of such contracts and that the Circuit Court of Ap-

peals erred in refusing to follow them. But, as we understand the brief, it does not contend that, by reason of the rule of decision declared by Sec. 34 of the Judiciary Act of 1789 (now Rev. Stat. Sec. 721, U. S. C. title 28, Sec. 725), this court is required to adopt the Kentucky decisions. But, granting that this point is before us, it cannot be sustained. The contract gives respondent, subject to termination on short notice, license or privilege to solicit patronage and park its vehicles on railroad property at train time. There is no question concerning title to land. No provision of State statute or constitution and no ancient or fixed local usage is involved. For the discovery of common law principles applicable in any case, investigation is not limited to the decisions of the courts of the State in which the controversy arises. State and Federal courts go to the same sources for evidence of the existing applicable rule. The effort of both is to ascertain that rule. Kentucky has adopted the common law and her courts recognize that its principles are not local but are included in the body of law constituting the general jurisprudence prevailing wherever the common law is recognized. As respects the rule of decision to be followed by Federal courts, distinction has always been made between statutes of a State and the decisions of its courts on questions of general law. The applicable rule sustained by many decisions of this court is that in determining questions of general law, Federal courts, while inclining to follow the decisions of the courts of the State in which the controversy arises, are free to exercise their own independent judgment. That this case depends on such a question is clearly shown by many decisions of this court. *Swift v. Tyson*, 16 Pet. 1, was an action on a bill of exchange. Mr. Justice Story, writing for the court, fully expounded Sec. 34 of the Judiciary Act. *Carpenter v. Providence Washington Ins. Co.* 16 Pet. 495, held that the construction of an insurance policy involves questions of general law. *Lane v. Vick*, 3 How. 464, involved the construction of a will. It was said: "This court do not follow the State courts in their construction of a will or any other instrument, as they do in the construction of satutes." *Foxcroft v. Mallett*, 4 How. 353, held that the decision of a State court construing

a deed is not conclusive on this court. *Chicago v. Robbins*, 2 Black, 418, declined to follow the determination of the State court as to what constitutes negligence. *Yates v. Milwaukee*, 10 Wall. 497, held that the determination of what constitutes a dedication of land to public use is one of general law. *Olcott v. Fon du Lac County*, 16 Wall. 678, held that the determination of what is a public purpose to warrant municipal taxation involves a question of general law. *New York C. R. Co. v. Lockwood*, 17 Wall. 357, declined to follow the State rule as to liability of common carriers for injury of passengers. *Liverpool & G. W. Steam Co. v. Phenix Ins. Co.*, 129 U. S. 397, held a question concerning the validity of a contract for carriage of goods is one of general law. *Baltimore & O. R. Co. v. Baugh*, 149 U. S. 368, so held as to the responsibility of a railroad company to its employees for personal injuries. *Beutler v. Grand Trunk Junction R. Co.*, 224 U. S. 85, decides who are fellow servants as a question of general law."

COLUMBIA RAILWAY, GAS, & ELECTRIC CO. *v.* STATE OF SOUTH CAROLINA, 261 U. S. 236.

"But, although the State court may have construed the contract and placed its decision distinctly upon its own construction, if it appear, upon examination, that, in real substance and effect, force has been given to the statute complained of, our jurisdiction attaches. In *Houston & T. C. R. Co. v. Texas*, 177 U. S. 66, this court said:

" 'Thus we see that although the decision of the State court was based upon the ground that the warrants in which these payments were made had been issued in utter violation of the State Constitution, and were hence void, and that no payments made with such warrants had any validity, and although this ground of invalidity was arrived at without any reference made to the Act of 1870, yet the necessary consequence of the judgment was that effect was thereby given to that Act, and in a manner which the company has always claimed to be illegal and unwarranted by the Act when properly construed. The company has never accepted such a con-

struction, but, on the contrary, has always opposed it, and raises the question in this proceeding at the very outset. Upon these facts this court has jurisdiction, and it is its duty to determine for itself the existence, construction, and validity of the alleged contract, and also to determine whether, as construed by this court, it has been impaired by any subsequent State legislation to which effect has been given by the court below.'"

CRESWILL v. GRAND LODGE K. OF P., 225 U. S. 246, 261.

"While it is true that upon a writ of error to a State court we do not review findings of fact, nevertheless two propositions are as well settled as the rule itself, as follows: (a) that where a Federal right has been denied as the result of a finding of fact which it is contended there was no evidence whatever to support and the evidence is in the record, the resulting question of law is open for decision; and (b) that where a conclusion of law as to a Federal right and a finding of fact are so intermingled as to cause it to be essentially necessary, for the purpose of passing upon the Federal question, to analyze and dissect the facts, to the extent necessary to do so the power exists as a necessary incident to a decision upon the claim of denial of the Federal right."

DAWSON *v.* KENTUCKY DISTILLERIES & WAREHOUSE COMPANY, 255 U. S. 288.

This case involved the constitutionality of a tax upon all persons engaged in the business of manufacturing, *owning and storing* whisky, or "in the *business of owning* and storing" the same in bonded warehouses within the State, called an "annual license tax" of 50c a gallon upon "all whisky withdrawn from bond or transferred in bond from Kentucky to a point outside the State." The right to withdrawn whisky was evidenced by the negotiable warehouse receipts. The warehouseman was required to collect the tax and pay it to the State. The court said:

"The thing really taxed is the act of the owner in taking his

property out of storage into his own possession, for the purpose of making some one of the only uses of which it is capable. * * * The whole value of the whisky depends upon the owner's right to get it from the place where the law has compelled him to put it, and to tax the right is to tax the value." "To levy a tax by reason of ownership of property is to tax the property. * * * It cannot be made an occupation or license tax by calling it so."

Here we have illustrated a tax upon *a right in property*, held to be the same as a tax upon the property itself. The exercise of the right to withdraw the liquor, was held to be a property right indistinguishable from the right *to* the liquor itself.

EDUCATIONAL FILMS CORPORATION v. WARD,
282 U. S. 379, 387-388.

"But the nature of a tax must be determined by its operation rather than by particular descriptive language which may have been applied to it. As was said in *Macallen Co. v. Massachusetts*, 279 U. S. 620, 625, 626, 'neither State courts nor legislatures, by giving the tax a particular name, or by using some form of words, can take away our duty to consider its nature and effect. This court must determine for itself by independent inquiry whether the tax here is what in form and by the decision of the State court it is declared to be.' On appeal from the State court in *People ex rel. Bass, Ratcliff & Gretton v. Tax Commission*, 232 N. Y. 43, 46, 133 N. E. 122, this court upheld the tax and defined its nature, saying, 266 U. S. 271, 280, 'It is not a direct tax upon the allocated income of the corporation in a given year, but a tax for the privilege of doing business in one year measured by the allocated income accruing from the business in the preceding year.'"

FLINT v. STONE TRACY COMPANY, 220 U. S. 107, —

And the cases decided with it, involved the constitutionality of the act of Congress which made *every corporation engaged*

in business subject to a special excise tax "with respect to the carrying on, or doing business by such corporation," of 1% of its net income. (Id. 143 to 145). The corporations contend that, in the light of the Pollock case, the so-called excise tax was nothing but a tax upon their property. Pointing to the fact that the law expressly declared, and the circumstances showed, that besides their physical properties and the income thereof the corporations to be subject to the tax must be and most of them were possessed of a going concern value the court said:

"It is therefore apparent, giving all of the words of the statute effect, that the tax is imposed not * * * * upon the property of the corporation, but upon the doing of corporate * * * * business, and with respect to the carrying on thereof." "In other words the tax is imposed upon the doing of business of the character described, and the measure *of the tax is to be the income.*" * * * *

The court reiterated the view expressed in the Pollock case that "an act might lay a direct tax on real or personal property, and at the same time also lay excise taxes on business, privileges, employments and vocations."

The court further said:

"Within the category of indirect taxation * * * * is embraced a tax upon business done in a corporate capacity, which is the subject matter of the tax imposed in the act under consideration. The Pollock case construed the tax there levied as direct, because it was imposed upon property simply because of its ownership. In the present case *the tax is not payable, unless there be carrying on or doing of business in the designated capacity, and this is made the occasion for the tax,* measured by the standard prescribed. THE DIFFERENCE BETWEEN THE ACTS IS NOT MERELY NOMINAL, *BUT RESTS UPON* SUBSTANTIAL *DIFFERENCES* BETWEEN THE *MERE OWNNERSHIP* OF PROPERTY *AND* THE *ACTIVE DOING OF BUSINESS* IN A CERTAIN WAY. The tax, as we have construed the statute may be described as an excise upon the particular privilege of doing business in a corporate capacity, i. e., with the advan-

tages which arise from corporate or quasi-corporate organizations; * * * * *the requirement to pay such taxes involves the exercise of privileges, and the element of absolute and unavoidable demand is lacking.* If business is not done in the manner described in the statute, no tax is payable (Id. 151, 152)."

Referring to the fact that the method of measuring a tax—apportioning it—is often confused with the character and nature of the tax itself *G. H. & S. A. Railway Co. v. Texas,* 210 U. S. 217, supra, is cited as involving an attempt to directly tax receipts of a carrier from interstate commerce. The fact that the tax was measured by an amount of 1%, or equal to 1%, is shown to be of no consequence. *Western Union Telegraph Company v. Kansas,* 216 U. S. 1, was cited as holding that a charter fee based upon the entire capital of a company engaged in interstate commerce was in reality a tax upon such commerce, and a tax on property beyond the jurisdiction of the State. The court observed:

"There is nothing in these cases contrary * * * * to the familiar rulings of this court which hold that WHERE A TAX IS LAWFULLY IMPOSED UPON THE EXERCISE OF PRIVILEGES * * * * THE MEASURE OF SUCH TAX MAY BE THE INCOME FROM THE PROPERTY OF THE CORPORATION. * * * * *The distinction lies between an attempt to tax the property as such, and to measure a legitimate tax upon the privileges enjoyed in the use of such property.*"

In the couse of the decision, it became necessary to determine whether certain corporations, parties to the litigation, were *doing business* within the meaning of the law. It was held that corporations organized to lease properties, collect rentals, manage office buildings, make investments, lease land, collect royalties, manage wharves, and in some cases reinvest the surplus, were engaged in business within the meaning of the law.

FOX RIVER PAPER COMPANY v. RAILROAD COMMISSION, 274 U. S., 651.

"There being no question of evasion of the constitutional issue, this court on writ of error must accept as final the ruling of the state court of last resort on all matters of state law. * * * * We accept as conclusive the state court's view of the nature of the rights of riparian owners."

FROST v. RAILROAD COMMISSION, 271 U. S. 583.

"That consistently with the due process clause of the 14th amendment, a private carrier cannot be converted against his will into a common carrier by mere legislative command, is a rule not open to doubt."

G. H. & S. A. RY. CO. v. TEXAS, 210 U. S. 217.

The physical properties of Railroad Companies had long been taxed in Texas in the Constitutional[1] method when the Legislature enacted that all Railroad Companies owning and operating railroads should pay a tax "equal to" 1% of their gross receipts. It was contended by the State that this was but an occupation tax. The Railroad Companies argued that the tax was a tax upon their gross receipts, and even if considered as an occupation tax, it taxed receipts from interstate business in violation of the Interstate Commerce clause of the Federal Constitution.

The Supreme Court of Texas held, 97 S. W. 71, that the the tax was levied on the railroads for the privilege of carrying on business in the state, and that it was not a tax upon interstate transactions of the Railroad Company.

This Court reversed the decision and pointing out that neither form nor evasion would prevent the court from considering substance, it held the tax was upon all property of the railroads, both in, and out of the state; that the property and its income were to be considered as one and the same

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1. See Appendix C hereto.

thing; the *"going concern value" was another thing*, that each was subject to separate taxation by the State, but the right to levy on either was limited to the boundaries of the state.

LAWRENCE v. STATE TAX COMMISSION, 286 U. S. 276, 280.

"The present tax has been defined by the Supreme Court of Mississippi as an excise and not a property tax * * * but in passing on its constitutionality we are concerned only with its practical operation, not its definition or the precise form of descriptive words which may be applied to it.

MCCOACH v. MINEHILL S. & H. R. CO., 228 U. S. 295.

A railway company which had constructed and was operating a line of railroad, pursuant to Legislative authority, leased its entire assets to another road for an annual rental and thereafter ceased to do any railway business. It did however, maintain a skeleton organization for the purpose of collecting rentals; it annually elected officers, received the rentals, deposited it, paid the necessary expenses of its office, maintained a contingent fund from which it paid dividends, etc.

The Court held that the company was not liable for the payment of the corporation excise tax involved in *Flint v. Stone Tracy Co.*, saying:

"It is therefore apparent, giving all the words of the statute effect, that the tax is imposed not upon the franchises of the corporation irrespective of their use in business, nor upon the property of the corporation, but upon the doing of corporate or insurance business, and with respect to the carrying on thereof, in the sum equivalent to 2 per centum upon the entire net income over and above $5,000, received from all sources during the year; that is, when imposed in this manner it is a tax upon the doing of business with the advantages which inhere in the peculiarities of corporate or joint stock organizations of the character described. As the latter organizations share many benefits of corporate organization it

may be described generally as a tax upon the doing of business in a corporate capacity. . . . The income is not limited to such as is received from property used in the business, strictly speaking, but is expressly declared to be upon the entire net income above $5,000, from all sources, excluding the amounts received as dividends on stock in other corporations, joint stock companies or associations, or insurance companies also subject to the tax. In other words, the tax is imposed upon the doing of business of the character described, and the measure of the tax is to be the income, with the deduction stated, received not only from property used in business, but from every source. * * *

"The precise question presented by the present record is whether the Minehill Company is 'doing business' in the sense in which the realty companies concerned in *Flint v. Stone Tracy Co.*, 220 U. S. 107, 170, were doing business, or had gone out of business in substantially the same sense that the Minneapolis Syndicate had done so.

"From the facts as stated above it is entirely clear that the Minehill Company was not, during the years of 1909 and 1910 engaged at all in the business of maintaining or operating a railroad, which was the prime object of its incorporation. This business, by the lease of 1896, it had turned over to the Reading Company. If that lease had been made without authorization of law, it may be that for some purposes, and possibly for the present purpose, the lessee might be deemed in law the agent of the lessor; or, at least, the lessor held estopped to deny such agency. But the lease was made by the express authority of the state that created the Minehill Company, conferred upon it its franchise, and imposed upon it the correlative public duties. The effect of this legislation and of the lease made thereunder was to constitute the Reading Company the public agent for operation of the railroad, and to prevent the Minehill Company from carrying on business in respect of the maintenance and operation of the railroad so long as the lease shall continue. And it is the Reading Company, and not the Minehill Company, that is 'doing business' as a railroad company upon the lines covered by the lease, and is taxable because of it."

MICHIGAN PUBLIC UTILITIES COM. v. DUKE, 266 U. S. 570.

Plaintiff was a private carrier, but the law attacked authorized the commission to impose on him the burdens of a common carrier. The court said:

"It is beyond the power of the State by legislative fiat to convert property used exclusively in the business of a private carrier into a public utility, or to make the owner a public carrier, for that would be taking private property for public use without just compensation which no State can do consistently with the due process of law clause of the 14th Amendment."

MURRAY V. CHARLESTON, 96 U. S. 432.

"The city ordinances were in question on the ground of their repugnancy to the inhibition upon the States to make any law impairing the obligation of contracts; and the decision was in favor of their validity. Nothing else was presented for decision, unless it be the question whether the Acts of the State Legislature authorized the ordinances; and that was ruled affirmatively. The jurisdiction of this court over the judgments of the highest courts of the States is not to be avoided by the mere absence of express reference to some provision of the Federal Constitution. Wherever rights acknowledge and protected by that instrument are denied or invaded, under the shield of State legislation, this court is authorized to interfere. The form and mode in which the Federal question is raised in the State court is of minor importance, if, in fact, it was raised and decided."

NEW STATE ICE CO. V. LEIBMANN, 285 U. S. 262.

An Oklahoma law declared the ice business was a public one, and prohibited everyone from engaging therein without securing a license. This court examined fully the ground of the legislative declaration, held that on the facts the business was not affected with a public interest, in the sense of the regulation, and that the statute was void. Even the dissenting opinion admitted that "a legislature cannot by mere legislative fiat convert a business into a public utility."

PRODUCERS TRANSPORTATION CO. v. RAILROAD COMMISSION, 251 U. S. 228.

"It is, of course, true that if the pipe line was constructed solely to carry oil for particular producers under strictly private contracts, and never was devoted by its owner to public use, that is, to carrying for the public, the State could not, by mere legislative fiat or by any regulating order of a commission, convert it into a public utility or make its owner a common carrier."

SCHLESINGER v. WISCONSIN, 270 U. S. 230.

A State law as interpreted made all gifts within six years, gifts in anticipation of death, without regard to the fact of intent. This court said:

"Gifts inter vivos within six years of death, but in fact made without contemplation thereof, are first conclusively presumed to have been so made without regard to actualities, while like gifts at other times are not thus treated. There is no adequate basis for this distinction."

SMITH v. CAHOON, 283 U. S. 553.

A State statute declared all carriers for hire upon public highways were subject to regulation as common carriers, and required a certificate of public necessity and convenience for their operation. Appellant, a private contract carrier, was arrested and sought release on habeas corpus which the State court denied, upholding the validity of the law under the Federal Constitution. This court in reversing the decision, said:

"It is true that the statute does not in express terms demand that a private carrier shall constitute itself a common carrier, but the statute purports to subject all the carriers which are within the terms of its definition to the same obligations. Such a scheme of regulation of the business of a private carrier, such as the appellant, is manifestly beyond the power of the State."

SWISS OIL CORPORATION v. SHANKS, 273 U. S. 407.

This case involved the validity, under the Federal Constitution, of a law of Kentucky levying a gross production tax on producers of oil. The State court held the statute was not violative of the Federal Constitution; that even if the challenged enactment was invalid, the same tax would be due under the prior law.

"As the case is brought here from a State court, the construction put by the court upon the statutes and Constitution of its own State is not open to review here."

TYSON & BRO. v. BANTON, 273 U. S. 418.

A New York statute attempted to fix the resale price of theatre tickets, and declared the business of reselling them was affected with a public interest. This court said:

"The mere declaration by the legislature that a particular kind of property or business is affected with a public interest is not conclusive upon the question of the validity of the regulation. The matter is always one which is open to judicial inquiry."

UNITED STATES v. EMERY BIRD THAYER CO., 237 U. S. 28.

It was held that the government could not levy a franchise or excise tax, upon the Emery Bird Thayer Company as "a corporation doing business in the United States" where its sole function was the receipt of rents and distribution thereof to its stockholders, the corporation owning only one piece of business property in the City of St. Louis.

ZONNE v. MINNEAPPOLIS SYNDICATE 220 U. S. 187.

An attempt was made to collect the Federal Corporation excise tax from a corporation, the sole purpose of which was to hold title to one tract of land and distribute the rents therefrom to its stockholders. The court said:

"As we have construed the corporation tax law (*Flint v. Stone Tracy Co.*, 220 U. S. 170), it provides for an excise upon the carrying on or doing of business in the corporate capacity. We have held in the preceding cases that corporations organized for profit under the laws of the State, authorized to manage and rent real estate, and being so engaged, are doing business within the meaning of the law, and are therefore liable to the tax imposed.

"The corporation involved in the present case, as originally organized and owning and renting an office building, was doing business within the meaning of the statute as we have construed it. Upon the record now presented we are of opinion that the Minneapolis Syndicate, after the demise of the property and reorganization of the corporation, was not engaged in doing business within the meaning of the act. It had wholly parted with control and management of the property; its sole authority was to hold the title subject to the lease for 130 years, to receive and distribute the rentals which might accrue under the terms of the lease, or the proceeds of any sale of the land, if it should be sold. The corporation had practically gone out of business in connection with the property, and had disqualified itself by the terms of reorganization from any activity in respect to it. We are of opinion that the corporation was not doing business in such wise as to make it subject to the tax imposed by the act."